Annual Report on

Trends in the State Courts

• *2001 Edition* •

Knowledge & Information Services
National Center for State Courts

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Acknowledgments
The Knowledge and Information Services Office gratefully acknowledges the contributions and assistance of our colleagues within the National Center for State Courts, the state court community, and related court organizations whose efforts made this publication possible. We would also like to express our gratitude to the State Justice Institute (SJI) for its continued support of the state court community. Finally, thank you to National Center administrative staff who assisted with editing and distribution.

Research for this document was conducted under Grant SJI-01-N-111 from the State Justice Institute. Points of view expressed are those of the authors and do not necessarily represent the official position or policies of the State Justice Institute.

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Conference on Funding the State Courts, National ADR Resource Center, and Developing a Permanent Visioning and Strategic Planning Capacity within State Court Systems. His substantive work is now concentrated in the areas of court financial issues, court structure, and futures thinking and planning. He is a member of the National Center's new community of practice for Court Workload, Culture, and Performance. Mr. Pankey earned his J.D. from the College of William and Mary. He is a *Phi Beta Kappa* graduate of Hampden-Sydney College with honors in Political Science and History.

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INTRODUCTION

The Report on Trends in State Courts is read by a wide audience, including all levels of state court judges, court administrators, policymakers, legislators, the media, and others in the legal and policy fields. In preparing the report, the Knowledge & Information Service Office staff examines emerging issues, novel practices, and broad issues that could affect state courts in the future.

We welcome your suggestions for future articles or concepts. Please submit these to Mary Grace Hune at 757-259-1512 or email mhune@ncsc.dni.us. To order hard copies of Trends or any item referenced herein, please contact the Knowledge & Information Service Office at 1-800-616-6164 or send email to knowledge@ncsc.dni.us. The Trends Report will also be available for download soon on the NCSC website at http://www.ncsconline.org.

For thirty years the National Center for State Courts has provided leadership and service to the nation's courts. As the year 2001 comes to a close, the country faces uncertain times. We are only just beginning to see all of the ways the events of September 11 will change the way our nation conducts its affairs as well as forever altering the American people's personal feelings of safety. From increased vigilance by law enforcement officers as well as the citizens themselves, to economic recession, to fears about the future we are creating for our children, the American psyche will be altered forever by what we have experienced in the last few months.

In a recent article, Dr. Ronald J. Stupak laid out an individual action plan for U.S. citizens to help us pick up and move on. In it he points out that we as a nation must "preserve and protect our values of tolerance, freedom, liberty, rule of law . . ." and that we must "stay critical, both positively and negatively," so that we don't "abdicate our power as citizens to those who constitutionally serve . . ." *The State of the Nation: An Individual Action Agenda*, *http://www.mywisecounty.com/news/attack21.htm*. In these new times, our democratic principles will be tried and tested and our nation's judicial system will play a major role in this process.

In preparing Trends this year, the staff was mindful of the effect the events of September 11 and following might have on our courts. Issues concerning privacy and security tend to overshadow all others. Consideration of these events will color any reading of *Trends*, especially reports on court security, public records in the virtual age, the use of surveillance cameras, and the roles of the national leadership vis á vis the states. Understanding that the fundamental work of the courts must go on, however, other broad topics were selected including court administration, criminal justice, courts and the public, access and fairness, and federal-state relations.

Thank you to this year's contributors. I hope you enjoy this edition of *Report on Trends in the State Courts.*

Mary Grace Hune, editor

COURT SECURITY

Post 9.11 - Are Courts Really Secure?

By Timothy F. Fautsko

The Situation

Even before the attacks on the Pentagon and the World Trade Center, judges and court administrators nationwide have been conflicted over how to keep their courts both accessible but, at the same time, secure for the customers they serve. Should they adhere to national court performance standards allowing full and easy access to justice? Or, should they prepare for the worst and risk making their courts armed camps? Since September 11, 2001, court professionals both nationally and internationally have expressed an immediate need to review the security procedures they presently have in place and to increase efforts at better protecting the public and court personnel. Hence, in defining one of the most important new trends 2001 is to answer the question, "Post 9.11 - Are Courts Really Secure?

The Problem

According to a National Sheriffs' Association study, most security incidents happen around criminal and domestic relations courts. Over half of the incidents recorded in courts involved person-to-person assaults. Effect courthouse security programs encompass detection, deterrence, and limitation of damage. However, in order to accomplish this, a court must determine that they want an effective security program. Planning is the first step. Security planning requires the active and visible support of judges in order to be effective and three areas or issues must be considered: Operations, Technology, and Architecture.

The Solution

The development of an effective security program can be broken down into several steps. First, establish a Court Security Committee to plan and implement security improvements for the Supreme Court. One or more judges and court staff should serve on the committee and it should meet regularly during the planning process. Second, set objectives for the Court's security program and identify the known problems. Third, once problems are identified, conduct an in-depth staff, equipment, and facilities audit. Fourth, after this is accomplished, prepare a written audit report and prioritize and develop solutions into an action plan. Many solutions in the action plan can be accomplished without additional resources in a short time, while others may take more time or need funding. Fifth, from the action plan develop written policy and procedures statements, train employees so they understand them, and make sure they are enforced. For example, if the Court requires its customers and employees to pass through a magnetometer, it is imperative to support the integrity of the Court's security system by enforcing the rule that all customers and all employees, including all judges, with all of their belongings are checked through the magnetometer.

Implementation

For an improved court security program to be successful, it must meet four requirements: strong leadership, resources, professional planning, and enforcement. The leadership of the Court must have a commitment to involve all levels of employees in the Court in improving its security program. And, improvements to the security program must be individually tailored to meet the needs of the Justices and court personnel alike. As well, the security program in the Court requires appropriate funding and security personnel and court personnel will need training in the new operations and procedures.

The planning process for improving the security program cannot occur in a vacuum. Instead, it must involve law enforcement officials[1], emergency agencies, and court staff. Once it is enacted, the Court's improved security program will only be as effective and strong as the enforcement of its policies and procedures.

Current Issues in Court Security Post 9.11

Questions about court security issues can be directed to the National Center for State Courts Knowledge and Information Service at 1-800-616-6164 or send email to knowledge@ncsc.dni.us. You can also check some of these resources:

- **Disaster Recovery Planning**
  - See National Association for Court Management Disaster Recovery Planning for Courts: A Guide to Business Continuity Planning, Williamsburg, VA: NACM, 2000.

- **Mail Handling**
  - United States Postal Service responds to issues about mail security. http://www.usps.com/news/2001/press/serviceupdates.htm
  - Kimball Perry. "Court Revises Mail Procedure", *Cincinnati Post (Oct. 30, 2001)* http://www.cincypost.com/2001/oct/30/mail103001.html.
  - The Michigan Department of Community Health has put up a web site on dealing with bioterrorism concerns. http://www.mdch.state.mi.us/bioterror/phepr.htm

- **Data Security**
  - "Homeland Security Briefing Sheets Show Role of IT" *Government Technology* (Oct. 26, 2001) http://www.govtech.net/news/news.phtml?docid=2001.10.26-3030000000003477

[1] Court Security Guide, National Association for Court Management, Security Guide Subcommittee, 1995

- **Additional Measures for Courthouse Security**
  - Frankie Vitino. "Wise County Court House Officials Consider New Security Measures," (Oct. 1, 2001). http://www.salisburypost.com/2001sept/091901c.htm
  - Randall I. Atlas. "Designing for Security in Courthouses of the Future", 5th Court Technology Conference, National Center for State Courts, 1997. http://www.ncsc.dni.us/NCSC/TIS/CTC5/304.HTM
  - Julian McCartney. "Courthouse Security a Major Concern for Judges", Salisbury Post (Sept. 19, 2001) http://www.salisburypost.com/2001sept/091901c.htm
  - Victor Flango and Don Hardenbergh, eds. Courthouse violence : protecting the judicial workplace. Thousand Oaks, CA : Sage Publications, c2001. (H1 .A4)

PRIVACY

Conflicting Interests: Privacy versus Access to Records

By Kent Pankey

The specter of an Orwellian Big Brother was familiar long before computers were commonplace and is recognized now by individuals who have never read *1984*. Technological advances, while expanding the possibilities for human interaction and the exercise of individual freedoms, have simultaneously subjected those interactions and freedoms to the possibility of closer scrutiny and potential control. Anyone remotely familiar with computers and the Internet has encountered warnings about the security of information being communicated in the course of browsing various web sites. The well informed know that concerns about the potential collection and use of personal information should encompass not only governmental agencies but also private corporations, criminal enterprises, and mischievous hackers of all persuasions.

Retail businesses, medical services, and insurance companies, as well as governmental agencies, collect information about private individuals. Such information has long been assembled by such entities, but the records previously existed only in paper form and had to be accessed in person, one file at a time; technology now enables data about multiple individuals to be remotely accessed, aggregated, and transmitted in fractions of a second. Who has access to data and how it may be used is controlled by an imperfect web of laws—sometimes conflicting, sometimes well meaning but mistaken in conception, and frequently lagging behind the rapid advancement of technological possibility. Regulation is recognized as necessary to protect interests on both the side of privacy and that of access, but the proverbial devil is in the details. There are respectable advocates on both sides of the debate.[1]

The courts are actively engaged in the debate about privacy and access to records. Courts have always been record-keeping institutions—maintaining information about cases, land records, and other governmental activities. Most of these records have been "public" in nature. As more of the records have become accessible electronically, the courts have faced the same privacy concerns that have arisen elsewhere. Those wrestling with these concerns in the courts have not been oblivious to certain ironies. For example, Washington Supreme Court Justice Philip Talmadge observed that some of the very news media that have pressured the courts to broaden access to court records have been leaders in raising public concerns about the privacy of personal information. He relates:

> One news organization…editorialized recently that such sensitive personal information as bank account, credit card, and social security numbers should not be routinely disclosed. Those news organizations might be surprised to discover that such information routinely becomes a part of court records in Washington, particularly in the dissolution setting.[2]

[1] See, for example, information on the Privacy Foundation website, http://www.privacyfoundation.org/, and that of the California First Amendment Coalition, http://www.cfac.org/.

[2] Justice Philip Talmadge, "Privacy of Court Records: Striking a Delicate Balance" (May 2000) http://www.courts.wa.gov/editorial/privacy.cfm or http://www.wsba.org/barnews/2000/05/Talmadge.htm.

Smile! You're on "Red Light" Camera

By Mary Grace Hune

In the first case of its kind, a San Diego Superior judge has ruled that California's capturing of evidence via traffic stop cameras is unconstitutional.[1] The ruling only applies to about 300 motorists contesting their tickets for running red lights. The judge in the case said that evidence provided by the cameras was "so untrustworthy and unreliable that it should not be admitted."[2] In San Diego County the cameras were installed at traffic intersections to catch motorists who speed past red lights. Another aspect of this case that bothered the judge was that the cameras were installed by a third party commercial vendor who under an agreement with the county kept a portion of each ticket collected – about $70 of each $271 fine. The judge found that because of this, the legislation was flawed on conflict of interest grounds and that it violates a state law that prohibits law enforcement programs to be operated by private companies.

While in this country cameras have for the most part been used for traffic enforcement, in the wake of the recent attacks on the World Trade Center and the Pentagon, makers of controversial facial surveillance technology have experienced a rise in commercial inquiries as well as investor interest.[3] Face-scanning technology, which crosschecks surveillance footage with databases of criminal mug shots, has some concerned with possible invasions of privacy.

The technology has been in place in Britain and other countries for a number of years. A recent story on MSNBC[4] showed how cameras are being used in Britain to create databases of photos to locate known criminals. In Britain there are 1.5 to 2.5 million surveillance cameras watching private citizens – probably more per capita than in any other country according to Roger Bingham, of civil rights pressure group Liberty. "Technology has advanced so far over the last few years that areas where you would assume your privacy is intact is no longer the case," Bingham said.[5]

Face scanning technology was first used in this country at the 2001 Super Bowl in Tampa, Florida, to check the faces of sports fans attending the Super Bowl against a criminal database. Tampa police installed a second system to scan public streets in a neighborhood amidst public objections that the hidden surveillance of private citizens was an invasion of privacy. The surveillance act itself may not violate U.S. law, however, in that there is no right to privacy on public streets. Commentators, however, caution that the concern should be with what data is collected and how it will be used. In addition, policy makers should look at the error factor of the data and the ramifications on personal lives when incorrect data is relied on. While some vendors have led the way for regulation of this type of surveillance and will not accept contracts that might be considered invasive of citizens' privacy rights, others have downplayed the need to discuss the privacy issues. "I am frustrated and, in fact, feel guilty that we allowed all of this dialogue around this red herring called privacy to get in the way of deployment," said Viisage CEO Tom Colatosti, who offered his technology to the FBI free of charge following the

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[1] See discussion of the case at "Calif. judge says 'stop' to red light cameras", *USA Today*, September 5, 2001 and reprinted online at http://www.usatoday.com/life/cyber/tech/2001-09-05-judge-nixes-red-light-cams.htm.
[2] Id.
[3] "Interest in Face Scanning Grows", *MSNBC* (Sept. 18, 2001), http://www.msnbc.com/news/630735.asp
[4] "Big Brother Watching in Britain", *MSNBC* (Aug. 13, 2001), http://www.msnbc.com/news/613287.asp#BODY
[5] Id.

September 11 attacks.[6] The Liberty group believes citizens have become complacent about their privacy assuming that use of the surveillance cameras is for the public good. Bingham cautions, however, that regulation is needed to control what information is collected and about whom it is collected as well as for what purpose the information will be used.[7]

Links

- NYC Surveillance Camera Project http://www.mediaeater.com/cameras/news.html
- Doug Hanchett and Robin Washington , "Logan lacks video cameras" *Boston Herald* (online edition) (Saturday, September 29, 2001) http://www.bostonherald.com/attack/investigation/aussecu09292001.htm
- Agnes Blum, "Beach may scan Oceanfront faces *The Virginian-Pilot (Pilot Online) (* July 6, 2001) http://www.pilotonline.com/news/nw0706fac.html

[6] "Face Scanning", http://www.msnbc.com/news/630735.asp
[7] "Big Brother", http://www.msnbc.com/news/613287.asp#BODY

COURT ADMINISTRATION

Juries : Composition and Comprehension

By Hon. Michael Dann, ret.

In the United States, the institution of the jury is viewed as almost sacred. Trial by jury in both criminal and civil cases is guaranteed to all Americans in federal and state constitutions. While lavish praise has been heaped on the ideal, until recently few meaningful changes have occurred in jury service or trials.

Beginning in the late 1970's, the states initiated the first bold experiment with shortened terms of service. Today, most American citizens reside in "one (or so)-day/one trial" jurisdictions. One-day/one-trial is now the accepted wisdom on length of service and has become a permanent feature in every court in which it has been tried.[1]

In the past eight years, we have witnessed a flurry of jury reform activity at the state level.[2] These efforts to strengthen the institution by improving jury service focus on two main themes:

1. Expanding citizen opportunities for service, and
2. Giving jurors the "tools" they need to understand oftentimes-complex evidence and law.

Expanding Opportunities for Service: Changes in Jury Composition

Recognizing that the legitimacy of trial by jury will be enhanced by juries that look like our increasingly diverse nation, a number of innovations have been proposed or acted upon:

1. *Use of new and additional source lists*: New York State is an example where additional source lists were adopted in an effort to spread the opportunity for jury service more broadly and equitably. Despite using three-jury source lists prior to the mid-90s, the New York courts added unemployment and welfare lists to make jury duty more inclusive.[3] Other states have supplemented voter lists, and only three currently rely solely on voter registration lists.[4]
2. *Improving response rates to juror summons*: Dangerously low jury summons response rates, especially in urban areas,[5] have led many jurisdictions to react both proactively and punitively. For example, in the District of Columbia, a campaign

[1] See the National Center's "Best Practices Institute" resource tool on "one-day/one-trial": http://www.ncsc.dni.us/RESEARCH/bestpractices/Jury.html.
[2] These and other proposals were featured at the first Nation Jury Summit, held in New York City in February 2001, and co-hosted by the New York State Unified Courts and the National Center. See the Summit's website, www.jurysummit.com.
[3] "The Jury Project," Report to the Chief Judge of the State of New York (1994). See generally, Munsterman, Hannaford & Whitehead, Jury Trial Innovations (National Center for State Courts 1996); Munsterman, Jury System Management (National Center for State Courts). To order these publications, go to http://www.ncsc.dni.us/PUBS/PUB_CAT.HTML.
[4] Arkansas, Mississippi, and Montana.
[5] Urban court non-response rates, including undeliverable summonses, ranged from 30 to 90% in 1998. Boatright, Improving Citizen Response to Jury Summonses (American Judicature Society 1998).

extolling the twin virtues of jury service—civic duty and citizen empowerment—has been accompanied by a crackdown with contempt penalties for obvious slackers.[6] In some states, private contractors are paid to update mailing addresses for an increasingly mobile society.[7]

3. *Reduction or Elimination of Exemptions:* Kudos to New York (again) for leading the way by eliminating all 20 statutory exemptions from jury duty.[8] In addition to the symbolic value of this reform, many prominent NYC personalities have been selected for service in trials and have subsequently gone public about their positive experiences.[9]
4. *Improvements in pay and general treatment:* Minorities, minimum wage earners, and single parents are unfairly impacted by low juror pay. As a result of state jury commissions' work, juror pay has improved markedly in many states, including the two most populous states, California and New York.[10] Improving general treatment of jurors, especially by court staff in jury rooms and in courtrooms, has also received needed attention. Among other things, fair but firm time limits for trials are encouraged,[11] and special "juror hotlines" have been created.[12]
5. *Changes in jury selection:* A number of states have debated the wisdom of large numbers of peremptory challenges frequently allowed parties,[13] but few have acted on recommendations to curtail what many consider an unfair procedure that skews jury composition.[14] Far ranging and unnecessarily intrusive attorney questioning of prospective jurors has prompted calls for limits on lawyer voir dire[15] and other basic reforms, such as putting a judicial officer in the courtroom to superintend the process.[16]

Jury Comprehension Tools

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[6] Contact pastprojects@courtexcellence.org for a copy of a report on the jury awareness and appreciation activities in the District of Columbia. The recent court crackdown in the District of Columbia Superior Court was covered in the August 26, 2001issue of the Washington Post, at B6.
[7] Munsterman, Jury System Management 50 (1996) (contractors use the National Change of Address Locator).
[8] www.courts.state.ny.us/oca/jds/jury/ucs.
[9] For example, former New York jurors, Mayor Rudolph Guliani, and CBS News anchor Dan Rather spoke at the recent National Jury Summit. See note 2, above.
[10] In California, jury pay was increased from a national low of $5.00 a day to $15.00, in New York, from $15.00 a day to $40.00.
[11] E.g., Arizona Rules of Civil and Criminal Procedure, 16 (h) and 16.3 (a)(3), respectively.
[12] E.g., New York's 1-800-NYJUROR.
[13] E.g., Arizona: http://www.supreme.state.az.us/jury/Jury2/jury2f (no action taken); New York: www.courts.state.ny.us/oca/jds/jury/ucs (substantially reduced the number of peremptories in civil cases and is studying doing so in criminal cases). For a recent example of the impact of the exercise of peremptories in a high profile criminal case, see "In Moore's Trials, Excluded Jurors Fit Racial Pattern," Washington Post, Apr. 2, 2001.
[14] E.g., Hoffman, Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective, 64 U. Chi. L. Rev. 809 (1997); For a recent example of the impact of the exercise of peremptories in a high profile criminal case, see "In Moore's Trials, Excluded Jurors Fit Racial Pattern," Washington Post, Apr. 2, 2001, at A1.
[15] E.g., Arizona: https://www.supreme.state.az.us/jury/Jury2/jury2f.
[16] E.g., New York: https://www.courts.state.ny.us/oca/jds/jury2.

Concerns about lay jurors' abilities to understand and recall complex evidence (or simple evidence in prolonged trials) and after-the-fact and often obtuse legal instructions[17] have led over half of all states to form commissions or task forces to examine traditional jury trial procedures and to suggest reforms. A "jury trial innovations movement," aimed at improving juror satisfaction and comprehension, has resulted.[18]

1. *Typical trial reforms*:[19] Common among the changes recently adopted or proposed by task forces in several jurisdictions include:

    a. Instructing the jury in the law to be applied before opening statements (as well as at the close of evidence);
    b. Providing materials for note taking;
    c. Allowing juror questions of witnesses and the judge (in writing, passed to the judge);
    d. Furnishing jurors with multi-purpose notebooks, at least in lengthy trials and trials involving complex evidence or issues;
    e. Requiring use of plain English by all trial participants;
    f. Making final instructions shorter, clearer and better organized;
    g. Instructing before closing arguments by counsel;
    h. Providing a written copy of all instructions for each juror;
    i. Giving fully responsive answers to deliberating jurors' questions; and
    j. Reopening the case to respond to jurors' expressed needs if the jury reaches an impasse in deliberations.

2. *Other innovations*: Some reforms or innovations are being pioneered by one or more states:

    a. Pretrial jury tutorials, either live[20] or videotaped,[21] have been suggested to acquaint jurors with basic and indisputable background information on scientific and other technical subjects.[22]
    b. Since late 1995, Arizona judges have been instructing jurors in all civil trials that they are permitted to discuss the evidence among themselves during trial recesses, but only in the jury room when all jurors may be present and only as long as each juror refrains from forming or expressing any opinions about the outcome until the case is finally submitted to them for their decision. A study of almost 200 civil trials in Arizona revealed that, contrary to opponents'

[17] Bates. The American Jury System (Cantigny Conference Series Special Report) (McCormick Tribune Foundation 2000); Adler, The Jury: Trial and Error in the American Courtroom (1996); Schklar and Diamond, Juror Reactions to DNA Evidence: Errors and Expectancies, 23 L. & Hum. Beh.159 (1999) (simulated trial involving undergraduate students; substantial error in using probabilistic evidence resulted in discounting of results).
[18] Enhancing The Jury System: A Guidebook for Jury Reform (American Judicature Society 1999); Munsterman, et al., note 3, above; Ellsworth, Jury Reform at the End of the Century: Real Agreement, Real Changes, *32* U.Mich.J. L. Ref. 102 (1999).
[19] These and many more innovations are described in Munsterman, et al., at note 3.
[20] Black, An Interview with Judge Pamela Ann Rymer, 14 N.J.C. Alumni Mag. 10 (2000).
[21] The Einstein Institute's work on videotaped jury tutorials on DNA is described at www.einshac.org (Feb.-Mar. 2001 Newsletter).
[22] See Munsterman, et al., note 3 above, at 105.

concerns that allowing such discussions would facilitate premature judgments about outcomes, jurors allowed to discuss the case did not make up their minds about outcomes earlier than those given the traditional instruction.[23] Moreover, the change is supported by overwhelming percentages of Arizona trial judges and jurors and by a majority of trial lawyers in the cases included in the studies.[24]

c. *On-going and proposed research*: Jury researchers will report soon on a study of videotapes of several Arizona civil jury trials, juror discussions during recesses and juror deliberations (special permission having been given by the Supreme Court, but all parties must consent).[25] Former Arizona trial judge B. Michael Dann, now a Visiting Fellow at the National Center, has applied to the National Institute of Justice for funding of the first study intended to establish whether four selected jury trial innovations actually improve juror comprehension of complex and contested scientific evidence.[26]

Conclusion

The 50 states have been called the "great laboratories for experimentation with legal change."[27] This characterization is apropos of the past several years' efforts to improve the traditional jury trial. Continued attention to this important opportunity for citizen participation in government is needed to ensure the right to trial by jury for future generations of Americans.

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[23] Hannaford, Hans & Munsterman, *Permitting Jury Discussions During Trial: Impact of the Arizona Reform*, 24 L. & HUM. BEH. 359 (2000).

[24] Hans, Hannaford & Munsterman, *The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges and Jurors*, 34 U. MICH. J. L. REF. 302 (1999).

[25] The researchers conducting the work are Professors Shari Seidman Diamond and Neal Vidmar.

[26] The four reforms selected for testing with mock jurors in a case involving disputed DNA evidence are pretrial jury tutorials, juror questions, juror discussions and "process instructions" for jurors' use.

[27] U.S. Supreme Court Justice Louis D. Brandeis, New State Ice Co. v. Leibman, 285 U.S. 262, 311 (1932) (dissenting).

Non-Profit Status Options for Courts

By Anne Skove

Several courts have filed for 501(c)(3) status in order to accept donations or other gifts to the court. At least 16 states have set up some form of non-profit organization, and several others have attempted or researched the option.

Courts have the opportunity to receive funds from private sources; however, they often encounter legal and ethical difficulties in accepting and/or using such funds. For example, judges are forbidden to solicit funds or accept gifts. However, juror donations, for example, are a ready source of funds that many jurors will voluntarily forgo if there is a way to donate the money easily. In response to such situations, courts have either set up their own 501(c)(3)organizations, or partnered with nonprofits, such as those administered by local bar associations, in order to funnel the funds into a project for the public good. Juror donations funds, for example, have been used to furnish juvenile detention centers, build a children's waiting room in the courthouse, or pay for grafitti removal.

The states below have all explored this issue and come up with a solution.

501(c)(3) Status:

Arizona

The Maricopa County Adult Probation Department's Restorative Justice Resource Council is a 501(c)(3) organization. Contact: Mark Stodola, (602) 506-6445, Program Director for the Adult Probation Department. Additionally, a Scottsdale attorney, David Tierney at Sacks & Tierney, (480) 425-2600, coordinates the Council.

California

Superior Court, Orange County, CA (Santa Ana, CA) Drug Court. Contact: Alan Slater, 714-834-5277.

Sacramento Superior Court

San Diego: the court has set up a 501(c)(3) called the San Diego Justice Foundation to fund justice related programs. Contact: Angela Parker, Administrative Analyst with the court and CFO of the Foundation, AParkeMD@sdmc.co.san-diego.ca.us.

Comfort for Court Kids is a 501(c)(3) organization that provides emotional support (in the form of "healing" teddy bears) to children involved in court proceedings in the Los Angeles Juvenile Dependency Court. The program is supported by the Superior Court, CIVIC Partnership, Bar Associations, foundations, corporations, law offices, individual attorneys and the public at large through fund raising activities at the Children's Courthouse and in the community. Please contact:

Comfort for Court Kids, Inc.
Edmund D. Edelman Children's Court
201 Centre Plaza Drive, Suite 3
Monterey Park, CA 91754-2158
323-526 2520
Fax: 323-881 3792
tdybearatty@earthlink.net
http://www.courtkids.org

Similar programs exist in San Bernardino and Riverside Counties.

Colorado

The Colorado Judicial Department received a $10,000 grant from SJI to research and write a "think piece" on private funding of judicial branch education. The research portion of the project will examine the ethical, administrative, and legal aspects of judicial departments receiving and using privately donated funds for judicial branch education. Colorado had explored the possibility of establishing its own 501(c)(3) organization for purposes of soliciting, receiving, and using privately donated funds for judicial branch education. Preliminary research identified a few courts around the country who had accomplished this. However, the Judicial Department encountered difficulties regarding the ethical, administrative, and legal aspects of doing so, and worked to find an alternative solution. The solution was to collaborate with an existing 501(c)(3) organization, the Colorado Judicial Institute (CJI). Currently the Judicial Department and CJI are forging a model under which CJI would raise privately donated funds and manage them in an endowment. The endowment income would be used for judicial education using an application process, wherein the Judicial Department would submit requests to CJI. However, this arrangement is still in the very early stages and has not yet been implemented.Contact: Resa Gilats, 303-837-2339.

Connecticut

Sta-Fed, Inc., was a non-profit organization by which retired judges mediated civil cases. (See Tobin and Pankey, *Managing Budget Cutbacks*, Williamsburg: NCSC, 1994, pp.24 and 215.) The experiment ended but some of the judges involved have formed a for-profit business called Mediation Consultant, LLC, One Longwharf Drive, New Haven CT 06511, 203-781-8070. Contact: Penny Blair, administrator, or retired federal district court judge Robert Zampano, who was the prime mover behind both organizations, at the number above.

Hawaii

In 1997, the issue of whether the judicial branch had investigated or considered how gifts were handled arose. About 12 judges had; of those, only a few had followed up. One example of gifts to the court was incentives for drug court graduates (e.g., pins, ribbons, etc.).

Kids First program (for children of divorcing parents) is looking into establishing a 501(c)(3) organization in order to accept donated funds (in addition to donated services, which they have always had).

Michigan

Wayne County (Detroit) Circuit Court, Family Division, recently became a "unified family court" when the domestic relations (DR) and juvenile sides merged. (Juvenile had been part of the probate court.) However, the funding for these two did not merge along with the rest of the court. On the juvenile side, there was funding available for guardians ad litem (GALs). On the DR side there was no funding, although GALs are required in certain cases. The bar donated $900 to assist with GALs in DR.

The court wants to set up a 501(c)(3) organization in order to accept the donation ethically. The idea is that the new organization would be totally separate from the court. They are in the process of appointing a board. The board will not be made up of members of the legal community, but from a variety of community leaders. (In particular, Wayne County has a very high Arab population, and efforts are being made to include leaders in the Arab community.) No judges will be on the board, and judges will not advise the board or direct funds. Contact: Cindy Sherburn, 313-967-3851.

New York

The Center for Court Innovation is the non-profit research arm of the New York State Unified Court System. The Center runs a variety of court-community projects as well.

Center for Court Innovation
520 8th Ave.
New York, NY 10018
212-397-3050
Fax: 212-397-0985
info@courtinnovation.org
www.courtinnovation.org

North Carolina

The Institute of Government (IOG) at UNC Chapel Hill is a 501(c)(3) organization that runs public policy related programs. IOG's Drennan Fund (the Fund) has endowed judicial education programs in that state. However, this is not a blanket endowment; the Fund can only be used for a narrow issue. For example, money from the Fund has been used to finance seminars on drug courts and CASA programs.

Institute of Government
UNC Chapel Hill
Chapel Hill, NC 27599-3330
919-966-5381

Ohio

Hamilton County, Ohio (family)

Wisconsin

A statute (§20.680) was enacted that enables the state court law library to accept private donations. Contact: Ms. Jane Colwin, Dir. Public Services, Wisconsin State Law Library, (608) 261-2340.

Bar Foundations

Virtually every state bar and most local bars have companion bar foundations, sometimes called law foundations, which are 501(c)(3) entities. The National Conference of Bar Foundations is staffed by the ABA's Division for Bar Services.

Contact Elizabeth Derrico 312-988-5346, derricoe@staff.abanet.org. Many bench-bar cooperative efforts are noted in the ABA's annual *Summary of State and Local Justice Initiatives* http://www.abanet.org/justice/00summary/home.html.

Court Technology

By Lin Walker

The groundswell of technology advances brought about by the Internet has enabled the court community to reach beyond the walls of the courthouse and tear down boundaries that previously existed countywide, statewide, nationwide, and even internationally. As this trend toward globalization of the justice community manifests itself, courts in different stages of development are adopting a "lesson learned" mentality. As court system technology pioneers answer challenges, there is a trend toward collaboration and knowledge sharing. While the nature of the state court funding spawned a proliferation of incompatible systems, there is now a realization that court computer systems must talk to each other to more effectively handle law enforcement. Lawyers must be able to electronically file documents using a single software compatible with multiple court systems.

Collaboration and Knowledge Sharing

In 2001, the National Center for State Courts presented another highly successful Court Technology Conference (CTC7). Traditionally, these conferences offer a forum where court decision makers gather and share information about cutting edge technological advances for the justice community. As a CTC7 highlight, Professor Frederick Lederer, leading authority in the field of courtroom technology and director of Courtroom 21, effectively identified 2001 courtroom trends. These trends include the transition of written and oral evidence presentation to visual media, the evolution of court records from text to multimedia, the emergence of two-way video conferencing and remote appearances, and the impact of the Americans with Disabilities Act and assistive technologies. Other trends emphasized at CTC7 included electronic filing, information sharing, distance learning, privacy, and judicial support systems.

Electronic Filing

The trend toward the ideal "paperless" court is gaining momentum. Court managers are actively seeking the benefits of cost reduction and document availability offered by electronic filing. The term "electronic filing" is used by courts to refer to the migration from paper records to electronic records. It encompasses the delivery of documents to the court and the use of these documents, including public access and archival storage. Emerging issues include privacy, document certification, standards, and system interoperability. What are the obligations of the court when records are easily available on a desktop computer as opposed to manually digging through court records of old? Where is the balancing point between the Freedom of Information Act and the Individual Right of Privacy? How do we know a document is authentic? What about lawyers who need to file documents with multiple courts, all demanding different formats? These are questions being debated in the electronic filing arena. One solution is the current development of Electronic Filing Standards with Extensible Mark-up Language (XML) designated as the software tool of choice. The states of Utah and New Jersey are leaders in this endeavor.

Statewide Case Management Systems

As the legacy systems of the late 80s reach maturity, court managers are conducting "make or buy" or "keep and replace" analyses. The trend is to expand county-based systems to the state level in both the criminal and civil arenas. This trend also provides the opportunity to integrate court-automated systems with law enforcement, prosecutors, jails, social departments, probation, etc. The state of Colorado has been very successful in implementing the Colorado Integrated Criminal Justice Information System (CICJIS). Other states like Minnesota, South Carolina, and Delaware are beginning the "challenging voyage" to statewide automation.

Technology is solving many of the courts operational problems and as long as courts continue to reap the benefits of cost reduction and increased efficiency this trend will continue. Many international courts are turning to the United States to provide the model for worldwide development of technology-based courts. Australia and Singapore have made great strides in this endeavor.

CRIMINAL JUSTICE

Competency of Counsel and the State Courts

By Jose Dimas

As the debate on capital punishment intensifies, the Innocence Protection Act (S. 486, H.R. 912), which would attempt to improve the quality of legal representation in capital cases and ensure access to DNA evidence, has gained more attention since it was introduced in the last Congress.

The competent counsel issue, a major part of this legislation, is of preeminent concern to the state courts as most death penalty proceedings play out there. This places a greater responsibility on state courts to ensure adequate defense of indigent defendants charged in capital crimes, not only in the appellate and post-conviction stages, but also in representation at pretrial and trial proceedings. In addition, issues of equality, fairness, integrity, and public trust surround the death penalty debate and impact the public's perception of state courts.

Recently, DNA evidence has played a big role in exonerating some inmates from death row by scientifically demonstrating that the inmates were wrongly convicted. Although DNA evidence has revealed a few wrongful convictions, there is typically scant evidence to be examined. Most wrongful convictions occur because of other problems such as poor legal representation, mistaken identifications, unreliable testimony of informants, police/prosecutorial misconduct, and other reasons. In those instances, the justice system relies on a properly functioning adversarial system, in which a competent defense lawyer properly scrutinizes the state's case, consults with the client, conducts an investigation, obtains expert defense witnesses, and vigorously challenges the state's case.

During this period, the media has publicized a number of atrocious examples where the quality of counsel in capital case proceedings has been found wanting. For example:

- In 1992, George McFarland's attorney admitted to sleeping during parts of his trial. A judge permitted the trial to go on saying, "The Constitution guarantees the right to an attorney, it doesn't say the lawyer has to be awake." McFarland is currently on death row in Texas.

- In Georgia, a solo practitioner who had never tried a capital case defended Gary Nelson. A court appointed lawyer, who was struggling with his own divorce and bankruptcy, was paid between $15 to $20 an hour to defend Nelson. Requests from Nelson's lawyer for an investigator and co-counsel were denied in the course of the trial. A prosecution expert opined that a hair from the victim's body could have come from Nelson. This and other questionable circumstantial evidence was enough to convict Nelson. During post-conviction proceedings, a respected Atlanta law firm took over his appeal and was able to clear all charges and obtain Nelson's release. He erroneously spent 11 years on death row.

- Ronald Keith Williamson spent 9 years on death row for the rape and murder of a young woman. Williamson, who suffers from manic depression, was convicted on the basis of testimony from an unreliable witness. He was also defended by a lawyer who had never tried a capital case before and refused to meet with Williamson alone. In 1997, federal courts overturned Williamson's conviction because of ineffectiveness of counsel. He was released in 1999.

CCJ Action

In response to the recent activity surrounding this issue, the Conference of Chief Justices (CCJ) has been busy conferring and developing parameters to influence the debate in Washington. At its 2001 Annual Meeting in Seattle, the CCJ approved a resolution that supported the funding of capital case defender programs, but opposed attempts to impose federal standards on state courts relating to competence of counsel.[1]

In addition, the CCJ urged that any federal grant program established to support competency counsel standards should follow the overall outlines of the very successful federally-funded Court Improvement Program (CIP) which is run by the highest court in each state.

The CCJ has also asked NCSC to survey the various death penalty states to examine the competence of counsel standards currently in place. The survey found that, for example, some states, notably Ohio and Indiana, have taken major strides in developing an extensive process to ensure competent counsel in capital cases. California and New York also have well-funded public defender's offices with experience in handling capital cases. Even Texas, a state which has had a historically under funded and decentralized public defender system, has recently approved a law that will set up minimum standards for attorneys as well as provide $20 million in funding to counties to provide services. This competent counsel survey is available from the Information Resource Center of NCSC and is on its web site.

Recent Congressional Activity

Chairman Patrick Leahy (D-VT) of the Senate Judiciary Committee held a hearing in early summer on his legislation (S. 486) that aims to improve the quality of counsel in capital cases. Perhaps signaling the importance Leahy feels for this issue, it was the first hearing he held since taking the chair's gavel from outgoing Chairman Orrin Hatch (R-UT). The bill would require the 38 death penalty states to meet certain criteria to qualify for the $400 million in federal incarceration grants. A commission of 9 members, with at least 2 members from CCJ, would draft the federal standards. Under the bill, states would be required to establish a central, independent body to appoint lawyers for indigents in capital cases and to pay attorneys a "reasonable" hourly rate as well as administrative costs.

Leahy's legislation would also authorize capital defense grants to public and private organizations to help train and recruit qualified lawyers. This approach is similar to the now defunct Death Penalty Resource Centers that lost congressional funding in 1995. Most observers

[1] Resolution 14. Adopted by the State-Federal Relations Committee of the Conference of Chief Justices in Seattle, Washington at the 25th Annual Meeting on July 30, 2001.

agree that the Centers were perhaps victims of their own success as they were able to get many of their clients released from death row and wonder how long Congress would support such a process this time.

Prospects for passage of this bill are not certain. In the House, the Innocence Protection Act (H.R. 912) has 210 cosponsors that put it close to the 218 cosponsors required to allow it to be brought up in the House floor without a hearing. Senator Hatch (R-UT) remains opposed to the competence of counsel standards section of the legislation. "The provisions (of S. 486) are harmful to the efficient administration of justice; they are harmful to the rights of the states to order their own affairs; and above all, they are harmful to the victims, and their families, who are entitled to a fair and speedy justice being meted out to the perpetrators of these heinous crimes," stated Hatch during the hearing.

The NCSC Government Relations Office has prepared and in-depth analysis of S. 486/H.R. 912 as it impacts state courts. For a copy, please contact Jose Dimas at 703/841-5610 or at jdimas@ncsc.dni.us.

Demographics and the Criminal Justice System

By Kent Pankey

According to the Bureau of Justice Statistics (BJS), incidents of violent crime declined by 40 percent between 1994 and 2000.[1] Another piece of positive news is that, in the last six months of 2000, the total prison population among the 50 states actually *declined* by about 6,200 inmates (down 0.5%)—the first such measured decline since 1972. Indeed, the rate of annual increase in state *and* federal prison populations has been declining steadily since 1994--when the rate was 8.7%--to 1.3% in 2000.[2] Nevertheless, one cannot overlook the sobering fact that, overall, the governmental agencies within the United States incarcerated over 2 million persons at yearend 2000 (including federal, state, and territorial prisons; local and tribal jails; holding facilities of the Immigration and Naturalization Service; military facilities; and juvenile facilities).[3] Millions of additional individuals are under some form of supervision by criminal justice agencies.[4]

A number of facts indicate that the criminal justice system may be approaching a turning point, assuming it has not already passed one. Whether this change will be for good or ill remains to be seen. One matter to consider is the recent FBI report that, after the 1990s' steep declines in the number of serious crimes such as murder and rape, the rate of change leveled off in 2000.[5] Another fact, confirmed by recent Census data,[6] is that the population of U.S. teenagers will increase over the next decade and that a large number of prison inmates will be released.[7] As the once roaring economy of the 1990s bumps through the opening years of the new millennium, those teens and young adults historically proven to be at highest risk for committing crime may see fewer positive alternatives to criminal conduct. At the same time, with state revenues dropping and voters wanting more money spent on education, politicians may find it more difficult to ignore the high cost of warehousing criminals.[8]

Given these changing conditions, will other factors that have shared credit for the lower crime rates of the 1990s, such as improved police tactics and the demise of the crack cocaine markets that helped inflate crime rates during the late 1980s, be enough to keep crime rates in check? Will questionable "three-strikes" and no parole policies be reexamined? Are there alternatives to strict sentencing and "no-frills" correctional policies that could be effective and less costly in the long run? Can rehabilitation programs be established that will not meet the

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[1] Bureau of Justice Statistics (2001), http://www.ojp.usdoj.gov/bjs/glance/cv2.htm.
[2] Allen J. Beck and Paige M. Harrison, Prisoners in 2000 *BJS Bulletin*, August 2001, pp. 1-2, http://www.ojp.usdoj.gov/bjs/pub/pdf/p00.pdf.
[3] *Id*. at 1.
[4] The nation's combined federal, state and local adult correctional population—incarcerated inmates, probationers, and parolees--reached a new high of almost 6.5 million persons in 2000. The total represented 3.1 percent of the nation's adult population. "National Correctional Population Reaches New High: Grows By 126,400 During 2000 to Total 6.5 Million Adults," Department of Justice Advance (Press Release), August 26, 2001; http://www.ojp.usdoj.gov/bjs/abstract/ppus00.htm.
[5] James Vicini, "Crime Rate Levels Off After Eight-Year Decline," *YahooNews.com* (May 30, 2001), http://trends.csg.org/attachments/crime_levels.pdf.
[6] *Profiles of General Demographic Characteristics: 2000 Census of Population and Housing* (Washington, D.C.: U.S. Census Bureau, 2001; http://www.census.gov/Press-Release/www/2001/2khus.pdf), p. 1.
[7] Vicini.
[8] Fox Butterfield, "Inmate Rehabilitation Returns as Prison Goal," *New York Times Online* (May 20, 2001), http://trends.csg.org/attachments/inmate_rehabilitation.pdf.

same fate as those that were discredited and abandoned decades ago? For more on these trends and issues, see the following additional resources.

Crime Statistics

- Anne L. Stahl, "Delinquency Cases in Juvenile Courts, 1998," *OJJDP Fact Sheet* (August 2001), http://www.ncjrs.org/pdffiles1/ojjdp/fs200131.pdf.
- The State of Corrections
- Alexandria Marks, "For Prisoners, It's a Nearly No-Parole World," *Christian Science Monitor Online* (c. July 10, 2001) http://trends.csg.org/attachments/prisoners_no_parole.pdf.
- Ryan S. King and Marc Mauer, *Aging Behind Bars: "Three Strikes" Seven Years Later* (Washington, D.C.: The Sentencing Project, 2001), http://www.sentencingproject.org/pubs/3strikesnew.pdf.
- Jenni Gainsborough and Marc Mauer, *Diminishing Returns: Crime and Incarceration in the 1990s* (Washington, D.C.: The Sentencing Project, 2001), http://www.sentencingproject.org/news/DimRet.pdf.
- Reentry into the Community
- Joan Petersilia, "When Prisoners Return to the Community: Political, Economic, and Social Consequences," *Sentencing & Corrections: Issues for the 21st Century*, No.9 (November 2000), http://www.ncjrs.org/pdffiles1/nij/184253.pdf.

Problem Solving Courts

- Broward County Mental Health Court http://www.browarddefender.com/mcourt.htm
- Community Justice Exchange/Communitycourts.org http://www.communitycourts.org/
- Drug Courts Program Office http://www.ojp.usdoj.gov/dcpo/
- Domestic Violence Project of Santa Clara County http://www.growing.com/nonviolent/
- National Center for State Courts, Information Resource Center Family Violence section http://www.ncsc.dni.us/KMO/Topics/FamVio/FVSummary.htm
- King County District Court Mental Health Court http://www.metrokc.gov/kcdc/mhhome.htm

Alternative Approaches to Crime

- Michael E. Smith, "What Future for 'Public Safety' and 'Restorative Justice' in Community Corrections?" *Sentencing & Corrections: Issues for the 21st Century*, No. 11 (June 2001), http://www.ncjrs.org/pdffiles1/nij/187773.pdf.
- "The Restorative Justice and Mediation Collection: Executive Summary, *OVC Bulletin* (July 2000), http://www.ojp.usdoj.gov/ovc/publications/infores/restorative_justice/bulletin1/files/ncj20180301.pdf.
- Mark S. Umbreit and Robert B. Coates, *Multicultural Implications of Restorative Justice: Potential Pitfalls and Dangers* (Washington, D.C.: Office for Victims of Crime, 2000), http://www.ojp.usdoj.gov/ovc/publications/infores/restorative_justice/restorative_justice_ascii_pdf/ncj176348.pdf.

Rehabilitation

- "Making a Positive Impact," *Savannah Morning News* (c. June 1, 2001), http://trends.csg.org/attachments/making_positive_impact.pdf.

Public Opinion

- "Crime, Punishment and Public Opinion: A Summary of Recent Studies and Their Implications for Sentencing Policy" (The Sentencing Project, c. 2000), http://www.sentencingproject.org/brief/opinion.pdf.
- John Dillin, "Crime Down, But Many Still Edgy," *Christian Science Monitor Online* (c. June 19, 2001), http://trends.csg.org/attachments/crime_down_still_edgy.pdf.

COURTS AND THE PUBLIC

Online Divorce Records: Do Courts Need to Strengthen the Lock on the Bedroom Door?[1]

By Laura Morgan
Adapted by Anne Skove

It is a long-held and cherished belief that the conduct of any trial, whether civil or criminal, is a public matter.[2] This tradition is embodied in state constitutions making trials open to the public. Twenty-four states have explicit "open court" provisions in their state constitutions that call for all courts to be open to the public.[3]

The right to an open trial has turned on Sixth Amendment grounds[4], but more recently has also been based on First Amendment guarantees,[5] the enhancement of public trust and confidence in the justice system,[6] and the promotion of public participation in the workings of government.[7]

From acceptance that the public has a right to access civil cases, it was but a short step to the now generally accepted principle that the public's right to view the daily activities of the court system extends to pretrial proceedings[8] and to court records and documents as well.[9]

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[1] This article has been adapted from Laura W. Morgan, "Strengthening The Lock on the Bedroom Door: The Case Against Access to Divorce Court Records On-Line," 17 Amer. Acad. Of Matrimonial Lawyers, forthcoming Fall 2001.
[2] As stated by Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts,* 105 Harv. L.Rev. 428 (1991): "By longstanding tradition, the American public is free to view the daily activities of the courts through an expansive window that reveals both our civil and criminal justice systems."
[3] **Alabama** Const. art. I, § 13; **Colorado** Const. art. II, § 6; **Conn.** Const. art. I, § 10; **Delaware** Const. art. I, § 9; **Florida** Const. art. I, § 4; **Idaho** Const. art. I, § 18; **Indiana** Const. art I, § 12; **Kentucky** Const. art. I, § 14; **Louisiana** Const. art. I, § 6; **Mississippi** Const. art. III, § 24; **Montana** Const. art. III, § 6; **Nebraska** Const. art. I, § 13; **North Carolina** Const. art. I, § 35; **North Dakota** Const. art. I, § 22; **Ohio** const. art I, § 16; **Oklahoma** Const. art. II, § 6; **Oregon**. Const. art. I, § 16; **Pennsylvania** const. art. I, § 11; **South Dakota**. Const. art. VI, § 20; **Tennessee** Const. art. I, § 17; **Texas** Const. art. 1, § 13; **Utah** Const. art. I, § 11; **West Virginia** Const. art. III, § 17; **Wyoming** Const. art. i, § 8.
[4] *Gannett Co. v. DePasquale*, 443 U.S. at 384-91 (1978).
[5] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 580 (1980); *Globe Newspapers Co. v. Superior Court*, 457 U.S. 596, 611 (1982).
[6] *U.S. v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985).
[7] *Williams v. Stafford*, 589 P.2d 322, 325 (Wyo. 1979).
[8] *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 3-4 (1986). The right of access does not, however, to pretrial unpublished discovery material. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (discovery depositions are part of a "private process" and are not public components of a civil trial).
[9] Houchins v. KQED, 438 U.S.1 (1978) (Steven, J., dissenting) (First Amendment guarantees a full and free flow of information to the general public); Littlejohn v. BIC Corp., 851 F.2d 673 (3d Cir. 1988); Doe v. Santa Fe Indep. School Dist., 933 F. Supp. 647 (S.D. Tex. 1996).

The principle that court records are public is embodied in states' open records statutes.[10]

The public's right to view a civil trial and inspect judicial records and documents is not without limits, however.[11] A court, under its general supervisory powers over the conduct of a trial, may exclude the press and public when circumstances dictate.[12] Quite significantly, privacy rights of individuals can also prevent disclosure of personal matters in civil litigation. The Supreme Court has indicated that litigants have privacy interests in the information produced during discovery, and that courts should protect those interests by ensuring confidentiality when good cause is shown.[13] Moreover, despite the long tradition of open records, there is an equally long tradition holding that divorce records are not open to the public.[14]

The recognition that litigants do not surrender their privacy when they walk, voluntarily or involuntarily, through the courthouse door has manifested itself in numerous court decisions involving divorce. Recent cases from **Florida** and **New York** eschew privacy rights in favor of

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[10] **Alabama** Code § 36-12-40 (1991); **Alaska** Stat. §§ 09.25.120, 09.25.220(3) (1997); **Arizona** Rev. Stat. Ann. § 39-121 (1985); **Arkansas** Code Ann. § 25-19-103(1) (Michie 1992); **California** Gov't Code § 6252 (Deering Supp. 1994); **Colorado** Rev. Stat. Ann. § 24-72-202(6) (1997); **Connecticut** Gen. Stat. § 1-18a(d) (1997); **Delaware** Code Ann. tit. 29, § 10002(d) (1997); **D.C.** Code Ann. §§ 1-1502, 1-1529 (1997); **Florida** Stat. ch. 119.011(1) (1998); **Georgia** Code Ann. § 50-18-70(a) (Michie Supp. 1993); **Hawaii** Rev. Stat. § 92F-3 (1993); **Idaho** Code § 9-337 (1990); **Illinois** Ann. Stat. ch. 5, para. 140/2(c)-(d) (Supp. 1998); **Indiana** Code § 5-14-3-2 (1997); **Iowa** Code § 22.1 (1997); **Kansas** Stat. Ann. § 45-217(f)(1) (Supp. 1997); **Kentucky** Rev. Stat. Ann. § 61.870(2) (1997); **Lousiana** Rev. Stat. Ann. § 44:1 (West 1982); **Maine** Rev. Stat. Ann. tit. 1, § 402(3) (1998); **Maryland** Code Ann., State Gov't § 10-611 (1993); **Massachusetts** Gen. Laws Ann. ch. 4, § 7, cl. 26 (Supp. 1994); **Michigan** Comp. Laws Ann. § 15.232(2)(e) (Supp. 1997); **Minnesota** Stat. § 13.01, Subd. 7 (1997); **Mississippi** Code Ann. § 25-61-3(b) (1991); **Missouri** Rev. Stat. § 610.010(6) (1998); **Montana** Code Ann. § 2-6-110(1) (1997); **Montana** Code Ann. § 2-6-110(1) (1997); **Nevada** Rev. Stat. § 239.010 (West 1998); **New Hampshire** Rev. Stat. Ann. § 91-A:4, para. V (1990); **New Jersey** Stat. Ann. § 47:1A-2 (West Supp. 1994); **New Mexico** Stat. Ann. § 14-2-6 (Michie Supp. 1994); **New York** Pub. Off. Law § 86(4) (McKinney 1988); **North Carolina** Gen. Stat. § 132-1 (1993); **North Dakota** Cent. Code § 44-04-18 (1998); **Ohio** Rev. Code. § 149.011(G) (1998); **Oklahoma** Stat. tit. 51, § 24A.3(1) (West Supp. 1998); **Oregon** Rev. Stat. § 192.410 (Lexis 1998); **Pennsylvania** Cons. Stat. Ann. tit. 65, § 66.1(2) (West 1998); **Rhode Island** Gen. Laws § 38-2-2(d) (1997); **South Carolina** Code Ann. § 30-4-20(c) (Law. Co-op 1991); **South Dakota** Codified Laws Ann. § 1-27-1 (Supp. 1994); **Tennessee** Code Ann. § 10-7-503(a) (Supp. 1993); **Texas** Gov't Code Ann. § 552.002 (West 1998); **Utah** Code Ann. § 63-2-103(18)(a) (1997); **Vermont** Stat. Ann. tit. 1, § 317(b) (Supp. 1997); **Virginia** Code Ann. § 2.1-341 (Michie Supp. 1998); **Washington** Rev. Code § 40.14.010 (1998); **West Virginia** Code § 29B-1-2 (1993); **Wisconsin** Stat. § 19.32(2) (1992); **Wyoming** Stat. § 16-4-201 (1997).

[11] *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *United States v. A.D.*, 28 F.3d 1353 (3d Cir. 1994); *United States v. Simone*, 14 F.3d 833 (3d Cir. 1994).

[12] *Nixon v. Warner Communications, Inc.*, 435 U.S. at 598 (courts possess supervisory power over their records and files, and have properly denied public access where those records might become a vehicle for improper purposes); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13-14 (1986) (citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984). See generally Carol A. Crocca, Annotation, Propriety of Exclusion of Press or Other Media Representatives from Civil Trial, 39 A.L.R.5th 103 (1996); Kristine Cordier Karnezis, Annotation, Restricting Public Access to Judicial Records of State Courts, 84 A.L.R.3d 598 (1978).

[13] *Nixon v. Warner Communications, Inc.*, 435 U.S. at 598 (courts possess supervisory power over their records and files, and have properly denied public access where those records might become a vehicle for improper purposes); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13-14 (1986) (citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984). See generally Carol A. Crocca, Annotation, Propriety of Exclusion of Press or Other Media Representatives from Civil Trial, 39 A.L.R.5th 103 (1996); Kristine Cordier Karnezis, Annotation, Restricting Public Access to Judicial Records of State Courts, 84 A.L.R.3d 598 (1978).

[14] There is evidence that divorce cases are a different species of civil case. From the time of Foliamb's case (44 Eliz.), 3 Salk. 138, (about 1602) until the divorce act of 20 and 21 Vict. ch. 85 (about 1857), no absolute divorce could be judicially granted in England. The only legal separation recognized was a divorce from bed and board upon a decree of the Ecclesiastical Court. While American law allowed divorce more freely than English law in the colonies in New England, due to the absence of ecclesiastical courts, no judicial body with common law jurisdiction over marital cases existed, making divorce impossible in many colonies. It was only later that the civil system allowed for divorce, and even then under severely proscribed jurisdiction.

First Amendment rights.[15] Since the late 1980s, the trend in the case law has been clear: divorce court records are open to the public, and privacy rights of the individual must yield to the First Amendment when all factors are equal. It appears unlikely that courts, as opposed to legislatures, will find that privacy rights outweigh First Amendment rights any time soon.

The demand for electronic access to court case records has increased as courts have become more willing and able to provide such access. As of May 2001, **Alaska**, **Arizona**, **Arkansas**, **California**, **Colorado**, **Connecticut**, **Florida**, **Georgia**, **Idaho**, **Illinois**, **Kansas**, **Maryland**, **Missouri**, **New Mexico**, **Ohio**, **Oklahoma**, **Pennsylvania**, **Washington**, and **Wisconsin** all have made court filings available online.[16]

Not surprisingly, the increased demand for electronic access has coincided with an increased demand for privacy. Before the Internet, court records were available only on paper at the courthouse where they were filed. The clerk of court acted as gatekeeper for requests to inspect, making the records "practically obscure."[17] The Internet has eliminated the obscurity of public records. Now, anyone with a modem, DSL, or T1 line can retrieve information from home, cyber café, school, library, office, etc., any time of day or night. These courthouse records can provide a rich new source of data on private individuals as new technologies are able to amass private data in ways that can be associated with each other in a way that makes it economically advantageous to the compiler of information.

Because of the reality of electronic access and database compilation, many courts have taken a two-tiered approach to public access to court records: an open access standard for print form, a more limited access standard for electronic form. The various considerations for limiting electronic access, as opposed to paper access, include:

- preventing courts from becoming a source for mailing or phone lists for commercial interests (data mining); [18]
- preventing wide dissemination of information of a personal nature;
- reducing the ease with which personal information can be discovered by those with improper motives;
- avoiding potential harms of electronic search capabilities;
- preventing dissemination of inaccurate or incomplete information about an individual's criminal history or other type of court involvement, particularly dissemination of case records that were later sealed or expunged;

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[15] *Barron v. Florida Freedom Newspapers*, 531 So. 2d 113 (Fla. 1988); *Florida ex rel. Gore Newspaers Company et al v. Tyson*, 313 So.2d 777 (Fla. DCA 1975); *Peyton v. Browning*, 541 So.2d 1341 (Fla. DCA 1989); *Merrick v. Merrick*, 585 N.Y.S.2d 989 (N.Y. Sup. Ct. 1992); aff'd other grounds 593 N.Y.S.2d 192 (N.Y. App. Div. 1993); *Koons v. Koon*s, 15 N.Y.S. 2d 563 (N.Y. Sup. Ct. 1994); *Jensen v. Jensen*, 425 N.Y.S.2d 208 (N.Y. Sup. Ct. 1980); *Anonymous v. Anonymous*, 692 N.Y.S.2d 744 (N.Y. App. Div. 1999).

[16] http://ctl.ncsc.dni.us/publicaccess/; http://www.ncsc.dni.us/ncsc/tis/tis99/pubacs99/PublicAccesslinks.htm; http://www.ncsc.dni.us/ncsc/tis/tis99.

[17] See *US Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 US 749 (1989) (there is a privacy interest in information that, while publicly available, is "practically obscure" because of the effort entailed in obtaining it).

[18] Data mining is defined as the intelligent search for new knowledge in existing masses of data. See Joseph S. Fulda, Data Mining and Privacy, 11 *Alb. L.J. Schi. & Tech*. 105 (2000).

- avoiding the logistical problems of trying to redact confidential information from electronic records;
- protecting victims' rights;
- preventing identity theft;
- protecting judges from being placed in a false light, especially improper influence on judicial independence through data manipulation.[19]

Mandatory financial disclosure in divorce cases makes such cases unique. Thus, even those who favor complete open access to divorce cases online often agree that personal identifiers such as social security, credit card, bank accounts, should be deleted in order to prevent identity theft.[20]

Some courts and legislatures have recognized that divorce cases should simply not be available online because of privacy concerns that arise with the use of the Internet that are not present when the court records are in standard print form. For example, **Arizona** Supreme Court Rule 123 provides that no financial information shall be available electronically. Similarly, **California** Rule of Court §38 provides that cases involving family law should not be included in electronic records made available through remote access. **Colorado** Chief Justice Directive 98-05, shields financial affidavits, separation agreements, property division orders, custody and child abuse investigation reports, and material which the court find are personal and confidential to the parties and which do not fulfill any requirement of necessity of public knowledge from electronic access. **Massachusetts's** guidelines require that names of third parties identified in support and divorce proceedings where adultery is alleged or derogatory information regarding the character or reputation of that person shall not be publicly available. **New Jersey** Rule 5:3-2 requires that divorce files be confidential. **Virginia** Rule of Court 1:17(c)(3) provides that divorce filings shall not be made available online.

While recent cases hold there is a common law right of access to civil proceedings, many state statutes curtail that right in divorce cases under the theory that divorce proceedings are not the type of proceeding that was traditionally open to the public, i.e., there is simply no "public concern" in a private divorce proceeding.[21] For example, in **Nevada**, divorce proceedings are private upon the demand of either party.[22]In other states, statutes provide that divorce proceeding can be closed upon the discretion of the court.[23] State court rules may also provide that the court close divorce proceedings.[24]

Courts should be aware of a variety of factors, including:

- parent-child relationships that may be impacted by certain types of online information;

[19] http://ctl.ncsc.dni.us/publicaccess. See also Kate Marquess, Open Court?, 87 *ABA Journal* 54 (April 2001).
[20] Diana Digges, Internet Court Records Court Compromise Client Privacy, 2001 LWUSA 273 (April 5, 2001).
[21] E.g., Garden State Newspapers, Inc. v. Hoke, 520 S.E.2d 186, 193 (W. Va. 1999).
[22] Nev. Rev. Stat. Ann. § 125.080 (Michie 2000).
[23] E.g., Iowa Code § 598.8 (2000); Mont. Code Ann. § 3-1-313 (2000); N.Y. Dom. Rel. Law § 325 (2000); N.Y. Jud. Ct. Acts Law § 4 (2000); Utah Code Ann. § 78-7-4 (2000).
[24] E.g., Ark. Admin. Order No. 6 (2000) (All matters in the juvenile division of the chancery court as well as chancery and probate court hearings in domestic relations matters, e.g., adoptions, guardianships, divorce, custody, support, and paternity shall not be subject to broadcasting, recording, or photographing); Idaho R. Civ. P. 77(b) 2000) (All trials shall be conducted in open court except that in an action for divorce, the court may exclude all persons from the courtroom).

- the possibility of “gentle extortion” by parties involved in divorce on grounds of adultery, e.g.;
- the implications of requiring complete financial disclosure, and the appearance of such information in the records.

Certainly, this may not appear to be an issue for courts that do not offer online information. However, those courts that do have online information, or those that are considering putting more (or any) information online, should be aware of these concerns. By watching trends in other courts, courts that have not yet reached this stage of technological expertise can be aware of issues and solutions and avoid unnecessary problems.

ACCESS AND FAIRNESS

Pro Se/Customer Service Trends in the Courts

By Madelynn Herman

Customer-focused courts

Courts today are increasingly becoming more customer focused and user friendly. They are doing this in a variety of ways, which include but are not limited to, children and elder waiting rooms at the courthouse (**California**); day care assistance at the courthouse (**Colorado**, **Massachusetts**, and **North Carolina**); increased signage; name tags; expanded hours (Tampa, **Florida**); suggestion boxes (**Virginia**); user surveys (Overland Park, **Kansas** and **Virginia**); ombudsman programs (**New Jersey** and **New York**); photocopying services (Albuquerque, **New Mexico**); electronic calendar monitors (Scottsdale, **Arizona** and Prince George's County, **Maryland**); courthouse maps; dining areas or lounges; magazine racks (Kent, **Ohio**); statements of public service (Ann Arbor, **Michigan**); decorations such as children's art in the family court rooms (**California**); and re-designing court houses from the customers perspective (**Nevada**). Other examples of the courts becoming more customer-focused include a traveling night court in **Ohio** and on-site mental health screenings in Berkeley, **California**.

"In **Ohio**, one judge has started a traveling night court. For several evenings a month, he travels to different towns in the county and holds court sessions. This has been very popular among people who have a difficult time getting time off work to attend court at the regular time and place. These evening sessions tend to be devoted to domestic relations cases and cases that do not require big trappings (like juries, witnesses, etc.). Another judge has started doing some pre-trial hearings in an online chat room."[1]

The Mobile Crisis Unit in Berkeley, **California** is conducting on-site mental health screenings. Their *Court Project* places mental health professions in the felony and misdemeanor arraignment courts to evaluate a defendant's mental health status and make treatment recommendations to the judge. The evaluations are conducted in the court holding tanks and a quick determination is made of the defendant's psychiatric problems. If there is a need for a more in-depth assessment, the person is sent to Alameda County's in-custody Criminal Justice Mental Health Unit. The defendant is then scheduled to return to court in three days with a written report from the evaluating psychiatrist. The success of the Court Project can be attributed to several factors: speedy referrals to treatment, which are critical in engaging the clients; accessibility – the Court Project's offices are located seven blocks away from the court house; accountability to the courts through regular progress reports and daily attendance in court; and communication – the Court Project staff Berkeley Mental Health managers, the judges, pretrial services, and substance abuse treatment providers participate in regular meetings. [2]

[1] E-mail response from a court2court posting from Ulf Nilsson, Ohio Judicial Conference, August 15, 2001. For more information on this traveling night court, please contact Judge Richard E. Parrott, Union County Common Pleas Court, 937-645-3015.

[2] Susan Bookman, "Mental Health Services in the Courts: 25 Years of Experience in Berkeley, California," *The Pretrial Reporter*, June 7, 2001.

Courts meeting the needs of self-represented litigants

In addition to the courts becoming more customer-focused, the courts have experienced an increase in the number of litigants that are representing themselves. The courts are responding in a variety of ways to meet the needs of this growing population. Current ways of addressing the needs of self-represented or pro se litigants include:

- Self-help centers;
- One-on-one assistance;
- Court-sponsored legal advice;
- Internet technologies; and
- Various collaborative approaches

The Self-Help Center—The self-help center concept provides self-represented litigants with reference materials such as forms and detailed instructions in order to assist them with routine types of cases, such as uncontested divorce, modification of child support, guardianship, or landlord/tenant matters. Other reference materials that might also be provided include, law information, videos or instructional media, lists of attorneys or other resources in the community. The most well known example of a self-help center is in Maricopa County, **Arizona**. Many states have modeled their self-help centers after Maricopa County's self-help center. **California** alone has over 80 self-help centers operating in their state courts. **California** has also translated many of their forms into various languages to further assist pro se litigants. Most self-help centers are located in the courthouse but a few of communities have "mobile self-help centers" such as Ventura County (**California**) Superior Court or temporary centers that can be set up and taken down quickly, such as the 11th District Court of **New Mexico**.

One-on-One Assistance—Obtaining forms and instructions from self-help centers can be a tremendous assistance to court customers but many litigants ask for additional assistance. As more courts become comfortable with providing legal information to self-represented litigants, one-on-one assistance offered by court staff or trained volunteers often supplements the self-help center. The absence of an "unauthorized practice of law" statute makes giving 'legal advice' to pro se litigants less controversial in **Arizona**. One-on-one assistance may include referring pro se litigants to appropriate resources, assisting them in the completion of forms, or explaining court procedures. Some courts limit this type of assistance to certain case types such as domestic violence or family law.

The 20th District Court of **Colorado** (Boulder) takes giving one-on-one advice to pro se litigants very seriously. Their most senior and experienced court clerks staff the filing windows and the public telephone lines. Since the clerk's office was generally the first place pro se litigants went for help, they reasoned that it was more efficient and customer-friendly to provide litigants with access to court personnel who were the most knowledgeable about the court's policies and procedures.

Even though most self-help centers and one-on-one assistance programs take place on-site at the courthouse, a number of libraries also offer assistance to pro se litigants. A few examples include:

- The Washoe County Law Library in Reno, **Nevada** offers a free weekly "Lawyer in the Library" program where participants can talk with a volunteer lawyer one-on-one about their legal problems.
- The State Law Library of **Montana** has partnered with Montana Legal Services to offer a special pro se assistance program. They have volunteer attorneys and paralegals helping pro se's.
- The King County, **Washington** Bar Association Community Legal Services Programs and the Family Law Section provides "How to Complete your Divorce" classes in the law library once a month. One to two attorneys are present to assist and answer questions.
- The Legal Aide Society of Orange County, **California** has developed "I-Can!" – a computerized self-help program set up in two local public libraries.
- The public library in New Castle, **Pennsylvania** holds custody, divorce, and support clinics twice each month.
- The San Diego, **California** public library offers legal research classes for pro se patrons explaining how to use the law library.

Court-Sponsored Legal Advice—**California** took the one-on-one assistance model a step further with the statutory creation of a "family law facilitator" position in all of the state superior courts. In 1996, the **California** legislature passed the Family Law Facilitator Act in an attempt to alleviate California's growing pro se problem. "The **California** family law facilitator program departs from the traditional legal services assistance models to create a new paradigm that is showing great promise. The program offers large numbers of self-represented litigants quality (albeit limited) legal assistance in family law matters. The success of this program demonstrates the need to "think outside the box" to find better solutions in this arena. Critical to the success of the program are its legislative underpinnings."[3]

The Family Law Facilitator programs differ a great deal from traditional legal services programs in that:

- The Office of the Family Law Facilitator is an arm of the superior court[4]; facilitators are neutral and impartial persons assisting the court in its duty to provide due process of law and equal access to the court for all members of the community.
- It provides services to both parties, or if there is a joiner, all parties to an action.[5]
- The family law facilitator does not represent any party.[6]
- The act provides that "no attorney-client relationship is created between a party and the family law facilitator as a result of new information or services provided to the party by the family law facilitator."[7]

[3] Frances L. Harrison, Deborah J. Chase, and L. Thomas Surh, "California's Family Law Facilitator Program—A New Paradigm for the Courts," Journal of the Center for Families, Children and the Courts, vol. 2, 2000, at 61.
[4] California Family Code Section 10002.
[5] *Id*. Section 10004-10005.
[6] *Id*. Section 10013.
[7] *Id*.

- The emphasis of the family law facilitator programs is on providing legal information and education, not legal advice and strategy, to litigants.[8]
- Facilitator services are available to all self-represented litigants; the act does not require an income qualification test.[9]

Internet Technologies—As the courts put more and more information up on their web sites, they are increasingly tailoring assistance to pro se litigants through Internet technologies. Examples of this include, but are not limited to, litigants being able to download forms and instructions, computer programs to help litigants fill in forms; access to court records online; links to online resources including lawyer referral services; computer programs to help clerks prepare orders so that litigants can get them before they leave the courthouse; e-filing systems that are designed for pro se litigants; and videos to orient pro se litigants to the court process or how to complete commonly used forms. The most comprehensive web site to assist pro se litigants was recently unveiled by the **California** Administrative Office of the Courts at: http://www.courtinfo.ca.gov/selfhelp/. Other examples of how internet technologies are being used to assist pro se litigants includes software provided by the **Delaware** Family Court so that litigants can calculate the amount of child support that will be ordered. The **Utah** Administrative Office of the Courts has developed an interactive web application that uses information provided by self-represented litigants to prepare pleadings in uncontested divorce and landlord/tenant cases. See: http://168.177.211.91/html/ListOfApplications.html

Collaborative Approaches to Assist Pro Se Litigants—The most recent trend in pro se assistance programs is the development of collaborative programs by state and local courts, legal services/aid agencies, local bar associations, and community organizations. Pooling resources and distributing costs associated with pro se assistance programs allows more communities to address the needs of self-represented litigants. **Maryland** and **Massachusetts** are examples where this model is used. In 1995, the University of **Maryland** and the University of Baltimore Schools of Law, with financial support from the **Maryland** Court of Appeals, inaugurated an innovative project to provide law student assistance to *pro se* litigants in four **Maryland** jurisdictions: Baltimore City, and Baltimore, Montgomery, and Anne Arundel Counties.

The Legal Services Corporation is currently providing strong incentives for collaborative approaches to assist pro se litigants. They offer a *Technical Innovations Grant* program to assist state and local legal services organizations in project planning and activities for pro se assistance programs. See, http://www.rin.lsc.gov/rinboard/Techsite/SitePages/grants2001.htm.

[8] *Id*. Section 10004.
[9] *Id*. Section 10003.

Resources:

Jona Goldschmidt, et al, *Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers* (Chicago, IL: American Judicature Society, 1998). Also see the AJS web pages on pro se at: http://www.ajs.org/prose/home.html

Frances L. Harrison, Deborah J. Chase & L. Thomas Surb "California's Family Law Facilitator Program: A New Paradigm for the Courts," *Journal of the Center for Families, Children & the Courts*, vol. 2, 2000; http://www.courtinfo.ca.gov/programs/cfcc/resources/publications%20folder/ccc2/061harrison.pdf

Patricia A. Garcia, *User-Friendly Court: Customer Service in the Courthouse* (Chicago, IL: American Bar Association, Office of Justice Initiative, 1999); http://www.abanet.org/justice/99summary/user.html

"Pro Se Litigation" web module developed by the National Center for State Courts, Information Resource Center that provides useful information for the court community on the topic of pro se litigation at: http://www.ncsc.dni.us/KMO/Topics/ProSe/PSsummary.htm Includes bibliographies of print and on-line publications; links to state programs, initiatives, and other organizations that provide information and research on pro se litigation.

"Some Model Technology Self-Help Systems," *Zorza Associates*; http://www.zorza.net/resources/lsh-res.html

"ABA Justice Initiatives 2000"; http://www.abanet.org/justice/00summary/home.html Includes information on user-friendly courts and self-help for pro se litigants.

Court pro se links:

California Self-Help Center for the Courts website; http://www.courtinfo.ca.gov/selfhelp/.

Maricopa County Self-Help Center; http://www.superiorcourt.maricopa.gov/ssc/sschome.html.

9th Judicial Circuit Self-Help Center, Florida; http://www.ninja9.org/courtadmin/CourtResourceCenter/CourtResourceCenter.htm

Idaho Court Assistances Offices Project; http://www2.state.id.us/cao/services.asp

On-line Pro se manual for the Wisconsin Courts; http://www.courts.state.wi.us/misc/reports/Pro_Se_Report_12-00.htm

Non-Apparent Disabilities: The Newest Realm Involving the Courts and the ADA

By Amanda Murer

July 26, 2000 marked the 10-year anniversary of the Americans with Disabilities Act. The number of milestones that have been made for the disabled community in just one decade is truly amazing. Individuals with disabilities are no longer held back from participating in everyday life functions. Restaurants, community centers, museums, movie theaters, hotels, stadiums, and many other public places are now open and accessible to people with physical disabilities.[1]

Similar strides have been made within our nation's courthouses by providing equal access to all of those coming before the court to serve and receive justice. Defendants with hearing impairments can now hear court proceedings with the help of sign language interpreters. Witnesses who are visually impaired can now take the stand with the use and acceptance of Seeing Eye dogs in buildings. Jurors restricted to wheelchairs can now sit with other jurors due to accessible seating within the jury box. Accommodations like these have made justice accessible to all participants in the courtroom. However, there are still some disabilities that go unnoticed by many individuals.

An emerging trend for the ADA and the courts is extending to how courts identify and accommodate individuals with non-apparent disabilities. Beyond evident disabilities that most people are familiar with, non-apparent disabilities include those pertaining to various forms of physical illness, and cognitive developmental disorders.

The definition of cognitive developmental disabilities and disorders is "disturbances in the mental process related to thinking, reasoning, and judgment."[2] A person with a cognitive disorder may have difficulty understanding and processing a judicial hearing without special accommodation. Cognitive disorders have varying degrees of severity, the most severe being mental retardation. Less severe conditions include learning disabilities such as Attention Deficit Disorder (ADD), Attention Deficit Hyperactive Disorder (ADHD), and dyslexia.

Diabetes, severe allergies, chemical sensitivities, sleep apnea, and chronic fatigue are just a few of the physical illnesses that have been accommodated recently by our judicial system. Because of the increased knowledge and acceptance of various physical illnesses, the public is able to identify and accommodate these non-apparent impairments more readily. Overall, cognitive disabilities are more difficult to recognize, and are often overlooked more frequently than physical illnesses.

Understanding the different levels of non-apparent disabilities is the first step toward creating equality for those entering the courtroom. However, finding ways to verify non-apparent disabilities, and assist people with these disabilities are hurdles that still need to be overcome. Members of the disabled community need to know that accommodations in the courtroom can and will be made to assist them if possible. Individuals with non-apparent

[1] "Enforcing the ADA: Looking back on a Decade of Progress," A Special Tenth Anniversary Status Report from the Department of Justice (July 2000).
[2] "The On-line Medical Dictionary," www.graylab.ac.uk/cgi-bin/omd

disabilities may be embarrassed to ask for assistance for fear their disability may be questioned. One way to help the public feel more comfortable in asking for this assistance is to evaluate or establish various customer service methods to make the public aware of what accommodations for non-apparent disabilities can be offered to them. Offering the information up front may help people with non-apparent disabilities come forward if they know that the court is ready to assist them with their needs.

Another hurdle in overcoming discrimination against those with non-apparent disabilities is a court's verification that a person does indeed have a disability. It is evident that people with physical disabilities do not have to verify that they are indeed disabled, whereas people may question the validity of non-apparent disabilities. Once again, people with non-apparent disabilities may be afraid that they will be questioned about their disabilities or fear embarrassment. To many people, asking for documentation is considered intrusive, which can make verification a very sensitive matter. As a result, it is best to take people at their word when dealing with a non-apparent disabilities, rather than focusing on identifying different types of disabilities. It is, however, not unrealistic to ask a person the *nature* of his/her disability. Asking a person with a non-apparent disability about the *nature* of the disability not only gives one a better understanding of what the disability is, but an opportunity to appropriately accommodate that individual, as well. In essence, it is much more important to the ADA to focus on what a person needs to facilitate his/her participation in the courtroom, than to prove that a disability exists.

A recent survey* prepared by the ADA Resource Center for State Courts Project here at the National Center for State Courts showed that some courts are already making accommodations for those dealing with non-apparent disabilities. Some of those accommodations are:

- Modifying court schedules (for sleep apnea or chronic fatigue)
- Providing working refrigeration for people to store medicine
- Allowing for more frequent breaks or storing candy in the court (for diabetes)
- Allowing note taking and tape recorders (ADD, ADHD)
- Modifying lighting (lighting/chemical sensitivities)
- Requesting that people not wear perfume or aftershave in court (severe allergies)
- Limit time on stand (ADD and ADHD)

*The survey conducted for the ADA Resource Center for State Courts Project was produced from suggestions from the ADA Resource Center for State Courts Advisory Committee. The survey was sent to State Court Administrators in the Conference of State Court Administrators (COSCA) to be distributed to ADA Coordinators. The survey, which was conducted in the spring of 2001, is not ready for public distribution. Results will appear on the NCSC website at www.ncsconline.org at a later date

*** Any ADA coordinator or court administrator who would like to be a part of ada4courts, a national listserv provided by the NCSC, please contact Amanda Murer at amurer@ncsc.dni.us **

FEDERAL – STATE RELATIONS

Federalism 2001 : Shifting the Balance

By Mary Grace Hune[1]

Introduction

The constitution sets up a framework that defines the relationship between the states and the national government. Some commentators have characterized this framework as less a system of "separated powers" than "a government of separated institutions sharing powers." [2] Another assessment of the constitutional allocation of powers recognizes that governments perform different functions and that those functions are appropriately performed by institutions having different characteristics. Each branch, under this view, has superior but not exclusive authority with regard to its functions.[3] For example, our national government is best suited to address those aspects of policy that require national level regulation such as national defense, foreign policy, coining the currency, and commerce between the country and foreign nations as well as among the states. On the other hand, state governments are the more appropriate source of policy governing issues of state sovereignty or in settling disputes between residents of the state. This balance between the federal government and the states has survived for over 200 years through many national and international tests. It might be interesting, however, to see how the framers of the Constitution would view the massive volumes of federal laws and regulations prescribing in great detail how state and local governments must conduct what many would consider local responsibilities.

Over the years the federal government through Congress and the Executive branch has increasingly eroded the states' authority through over-regulation, cost shifts to the states, and preemption of state law. While Congress and the Executive agencies continue to pass laws and regulations that shift the balance between the states and the federal government in favor of increasing the realm of federal authority, recent Supreme Court decisions indicate that this court is viewing legislation that would encroach on state authority and is restoring the balance.

The Shifting Balance Between National & State Authority

Striking the balance between federal and state interests has occupied the Court since Marshall's decision in *Gibbons v. Ogden*[4] in 1824. Until very recently the balance of power between the two interests has been shifting to the federal side. One of the major factors in this shift was the 16th Amendment authorizing the federal income tax. This authority gave the federal government the power to generate a steady revenue source that no state can hope to match. Congress can now regulate state courts by tying adherence to the regulation to receiving

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[1] Thank you to Tom Henderson, Executive Director of the Government Relations Office of the National Center for State Courts, for assisting with the defining the constitutional framework, for providing the link to Richard Neustadt's work, and for pointing out the importance of the federal income tax to the discussion of the Congressional spending clause.

[2] Richard E. Neustadt, *Presidential Power:The Politics of Leadership from FDR to Carter* 26 (New York: Wiley, 1980)

[3] Jonathan L. Entin, "Separation of Powers, the Political Branches, and the Limits of Judicial Review" 51 Ohio St. L.J. 175 (1990)

[4] *Gibbons v. Ogden*, 9 Wheat. (22 U. S.) 204-205 (1824).

federal dollars. The Constitution's Spending Clause[5] permits Congress to attach conditions to the receipt of the funds, and the Supreme Court has affirmed Congress' power to implement policy objectives by conditioning receipt of federal funds upon compliance with federal statutory and administrative regulations.[6] In order to validly tie regulation to receipt of grant funds, basically the States must be cognizant of the strings attached to federal monies and must completely understand the consequences of acceptance.[7] Under current Supreme Court decisions Congress does not have to explicitly state conditions for receipt of the money provided it can be shown that Congress specifically stated that the regulation applied to the states and it can inferred from current doctrine, e.g. the common law, that the states should have been put on notice as to the nature of the consequences.[8] One commentator has observed that in fact the States have been more willing to give up control over traditional state activities provided Congress provides money in the form of grants to implement the regulation.[9]

Another factor is that there is a growing trend to seek national solutions to problems that have typically been under the jurisdiction of the states. More federal regulation is being brought to bear against activities that have traditionally been within the purview of the states. This trend has been fueled by two changes in attitude. First the people themselves are not much concerned with federalism. People get their news increasingly from national sources and therefore develop a greater familiarity with their national leaders. When a citizen becomes concerned over a matter on which government might help, most likely he will write to a national representative rather than a local leader. Businesses too have learned that it is less costly and more effective to lobby the national legislature than the 50 states to get the protections or remedies they want passed into law. Tort law and product liability reform now is happening more in Washington than in the states.[10]

Supreme Court Moving to Reestablish Federalism Balance

For state courts to be bound by a federal regulation of state court procedures the regulation must be authorized by a valid source of congressional authority and not be otherwise unconstitutional.[11] Congress has typically relied on the Commerce Clause as that source of authority.[12] The Commerce Clause has been held to empower Congress to regulate intrastate activities as well as those that substantially affect interstate commerce. The defining view is that Congress has the power to regulate not only acts which taken alone would have substantial economic effect on interstate commerce, but also individual acts which in their aggregate might have substantial national consequences. Congress now relies on "the cumulative effect" principle as its constitutional authority for regulating individual activities that would have historically been under the authority of the states. For example in *Perez v. United States,*[13] the Court held that

[5] U. S. Constitution Art. I, §8
[6] *South Dakota v. Dole*, 483 U.S. 203 (1987)
[7] Id.
[8] See for example, *Cedar Rapids Community School District v. Garret*, 119 S. Ct. 992 (1999); *Davis v. Monroe County Board of Education*, 119 S. Ct. 166 (1999).
[9] Racicot, Mark, et. al. "States' Rights in the Twenty-first Century". 26 J. Legis. 271
[10] Id.
[11] Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures,* 44 Vill. L. Rev. 1 at 14 (1999) citing to Laurence H. Tribe, American Constitutional Law 5-1, at 297 (2d ed. 1988).
[12] U.S. Const. art. I §8.
[13] 402 U.S. 146, at 154 (1971)

Congress could criminalize any of loan sharking's individual, purely intrastate activities "where the class of activities is regulated and that class is within the reach of federal power. . . ."[14] Recently, however, the Supreme Court, as the arbiter between the national and state powers, has moved to reestablish the balance in favor of the states' authority.

Commerce Clause

In decisions setting limits on Congress' reliance on the **Commerce Clause** for state regulation, the Court has struck down several pieces of legislation for reasons that the regulation was not a valid exercise of Congress' authority to regulate commerce. In relying on different tests the Court ruled that one exercise of federal power was not related to an economic activity that substantially affected interstate commerce[15]. In February of this year, the Supreme Court struck down a portion of the Violence Against Women Act that would provide for a civil remedy against persons who commit crimes of violence motivated by gender. In this case the Court found that Congress failed to meet the "substantially affects interstate commerce" test on several grounds: 1) Gender motivated crimes of violence are not an economic activity; 2) The particular part of the act in question did not contain a jurisdictional element that would establish a federal cause of action in pursuance of Congress' power to regulate interstate commerce; and 3) The aggregation of the gender-motivated crimes of violence, which is a subset of all crimes of violence, is an inappropriate use of aggregation in that such a interpretation would in effect grant Congress the right to regulate all crime.[16]

Fourteenth Amendment §5

> The 14th Amendment provides that "The Congress shall have power to enforce, by appropriate legislation, the provisions of" the Amendment.[17] Recently the Supreme Court has been addressing how far Congress can go in defining the substance of constitutionally guaranteed rights by virtue of its enforcement role under §5 . In several cases, the Supreme Court has basically said Congress does not have the authority to *define* the nature of substantive rights using its enforcement authority.[18] Neither may Congress use §5 to override the Court's interpretation of the 11th Amendment protecting states from suit in policy areas that are not within the purview of the 14th Amendment.[19] Further, in those areas in which Congress does have authority to act within the boundaries of the 14th Amendment, it must do so only by aiming the legislation at a state or state actor and not at individuals.[20]

10th Amendment

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[14] Id. At 154
[15] *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624 (1995)
[16] *United States v. Morrison* 529 U. S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000).
[17] U. S. Constitution 14th Amendment §5.
[18] *City of Boerne v. Flores* 117 S.Ct. 2157 (1997).
[19] *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank and United States* 119 S. Ct. 2199 (1999).
[20] *United States v. Morrison*, 120 S. Ct. 1740 (2000).

If the object to be regulated by Congress is one attributable to state sovereignty reserved by the 10th Amendment, then according to recent Supreme Court holdings, Congress lacks the authority under Art. I to regulate it. Note that this limitation on Congress to regulate matters reserved to the states by the 10th Amendment only applies to legislation enacted pursuant to Art. I enumerated powers, most often in reference to the commerce clause, and may be of lesser concern when Congress is acting under authority of §5 of the 14th Amendment. The question of what constitutes a matter of state sovereignty has been debated in several recent cases. In *New York v. United States*[21] the Court invalidated a provision of the Low-Level Radioactive Waste Policy Act. The clause, passed by Congress pursuant to the Commerce Clause, commanded the states to take specific actions. Justice O'Connor, writing for the majority, wrote that "the Constitution has never been understood to confer upon Congress, the ability to require the States to govern according to Congress' instructions."[22]

11th Amendment

Several recent Supreme Court decisions have focused on the question of whether state immunity from suit by private persons granted by the 11th Amendment can be abrogated by federal legislation pursuant to Congress' authority under the Commerce Clause. The Court has held that even when the Constitution vests in Congress complete law-making authority over an activity, the 11th Amendment prevents Congress from authorizing suit by private citizens against non-consenting states. The power of the federal government to press state courts and other state agencies into service is to coerce compliance with the objective to commandeer the entire political machinery of the State against its will at the behest of individuals.[23]

The Court has held that Congress may abrogate the States' 11th Amendment immunity when it both unequivocally intends to do so and acts pursuant to a valid exercise of its authority under §5 of the 14th Amendment.[24] In *Bd. Of Trustees of the University of Alabama v. Garrett*,[25] the Court looked at what constitutes a valid exercise of Congress' authority under §5 of the 14th Amendment. This case involved the application of provisions of the Americans with Disabilities Act that created a civil remedy for damages by a private individual alleging discrimination on the basis of disability by a State or one of its entities or officers. The Court confirmed the principle that "it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees. Accordingly, §5 legislation reaching beyond the scope of §1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"[26] In previous decisions the Court had held that because disability does not fall into a suspect class, States are not required by the 14th Amendment to make special accommodations for the disabled so long as their actions toward such individuals pass a minimum "rational-basis" review.[27] In addition, for private individuals to recover money

[21] 505 U.S. 144 (1992).
[22] Id. at 160. See also *Printz v. United States* 117 S. Ct. 2365 (1997) striking a provision of the Brady Handgun Violence Prevention Act on the grounds that it impermissibly attempts to compel the States to enact a federal regulatory program and that Congress could not try to circumvent that prohibition by directly conscripting the State's law enforcement officers directly.
[23] See *Seminole Tribe v. Florida* 116 S. Ct. 1114 (1996); *Alden v. Maine* 119 S. Ct. 2240 (1999).
[24] *Kimel v. Florida Bd of Regents* 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000).
[25] 531 U.S. 356, 121 S.Ct. 955, 148 L. Ed. 2d 866 (2001).
[26] *Id.* at 17, citing *City of Boerne v. Flores* 521 U.S. 507, 520, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997).
[27] See e.g. *Cleburne v. Cleburne Living Center, Inc.* 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

damages against the States the state discrimination must be in violation of the 14th Amendment and the remedy imposed by Congress must be congruent and proportional to the targeted violation.[28] In examining the "discriminatory" practices Congress sought to redress through Title I of the ADA, the majority found that Congress had not identified a history and pattern of irrational employment discrimination practices by the States against the disabled.[29] The Court also found that the rights and remedies created by the ADA against the States failed to meet the congruence and proportionality requirements. While it would be reasonable for a state employer to conserve scarce state resources by hiring those individuals who could work in existing facilities without accommodation, the ADA requires employers to make such facilities readily accessible to the disabled. To be excepted from the reasonable accommodation requirements of the ADA, the state employer would have to bear the burden of proving undue hardship in implementing the accommodation. This would place a greater burden on the state employer than is constitutionally required.[30]

Recent and Proposed Legislation in the 107th Congress that Regulates State Procedure

1) Y2K Act, 15 USCA 6601-6617 (West Supp. 2000) – An act to provide mandated procedures for the judicial system to handle breach of contract cases where the purchaser suffers a loss from a device or software application that does not meet Y2K compliance standards.
2) National Childhood Vaccine Injury Act, 42 U.S. C. 300aa-1 to34 (1994) – Provides a program for compensation of vaccine-related injuries. The act also specifies the manner in which civil trials in state courts may proceed against vaccine manufacturers.
3) Securities Litigation Uniform Standards Act, 105 P.L. 353; 112 Stat. 3227 and codified in various sections throughout Title 15 U.S.C. – Prohibits certain actions from proceeding as class actions and authorizing federal courts to stay discovery in state courts in certain cases.
4) Innocence Protection Act (S. 486 and H.R. 912)—Provides for national board to determine appropriate standards for counsel representing capital case defendants. Includes a provision of federal funding that represents a "stick" for states that do not adopt the standards. See discussion of this legislation on page 13 of this Report.
5) HR 1396 – A bill to encourage states to require a holding period for any student expelled for bringing a gun to school. Makes grant monies available to states for juvenile delinquency-related programs if the State enacts a law meeting several requirements that in effect require states to detain students suspected of bringing firearms onto school property in an appropriate holding facility for psychological evaluation.
6) Consequences for Juvenile Offenders Act of 2001 – authorizes the Attorney General to provide grants to promote greater accountability in the juvenile justice system including graduated sanctions for juvenile offenders. To qualify, states must provide assurances that state and local government units have in effect laws, policies and programs that ensure that sanctions for juvenile offenders escalate in intensity with each subsequent delinquent offense.
7) Class Action Fairness Act of 2001 H. R. 2341—Proposed legislation would federalize most state class action suits by allowing removal to federal courts and original jurisdiction in the federal courts with minimal diversity. This legislation has been pushed by various industry lobbies. The Government Relations Office of the National Center for State Courts has been watching attempts to pass class action reform for several years. In their National Affairs

[28] *Garrett*, 121 S. Ct. 955, at 963 (2001).
[29] Id. at 965.
[30] Id. at 966-967.

Briefing Book, July 29, 2001, they state that while "action in the 107th Congress is a possibility. . . the shift in power in the Senate diminishes the probability that it would pass." Notably, Senator Leahy, chairman of the Senate Judiciary Committee, has been opposed to provisions contained in previous attempts to pass this legislation. See for example his remarks on introducing the Tobacco Amendments to S. 353 "The bill's minimal diversity provision – which pushes all state-based claims to federal court where at least one plaintiff and one defendant are from different states – guarantees that tobacco-related cases will end up in federal court since the major tobacco companies are all headquartered in only one or two states while tobacco victims are nationwide." http://www.senate.gov/~judiciary/6292000_pjl1.htm

8) Violence Against Women Civil Rights Restoration Act of 2001 (H.R. 284 and H.R. 429). Proposed legislation to restore the civil remedy for crimes of violence motivated by gender. These bills have been introduced in response to the Supreme Court ruling striking down the civil remedy portion of the Violence Against Women Act (VAWA) 42 U. S. C. §13981 in *United States v. Morrison*. In that decision the Court held that Congress lacked authority to enact VAWA under the Commerce Clause. The Court found that (i) gender-motivated crimes of violence are not economic in nature, (ii) VAWA did not contain any jurisdictional element, and (iii) the Congressional findings regarding the impact on interstate commerce inappropriately blurred the distinction between national and local authority. The proposed legislation seeks to remedy these faults by specifically defining the nature of the interstate economic activity. Further H. R. 429 seeks to allow the Attorney General to bring a civil action in any appropriate federal district court against a State, political subdivision of a State, official, employee, or agent thereof, upon a finding that the State or political subdivision has engaged in a pattern or practice of resistance to investigating or prosecuting gender-based crimes. H. R. 429. This last clause further adds the possibility of suit against a state. If passed, this clause would probably meet constitutional requirements even under the 11th Amendment in that it is passed under Congress' 14th Amendment §5 enforcement authority. See discussion under 11th Amendment limits above.

Resources

Colloquuy, *States Rights in the Twenty-first Century*. 26 J. Legis. 271 (2000)

Anthony Bellia, Jr. *Federal Regulation of State Court Procedures.* 110 Yale L. J. 947 (2001)

Wendy E. Parmet, *Stealth Preemption: the Proposed Federalization of State Court Procedures*, 44 Vill. L. Rev. 1 (1999)

Michael W. McConnell, *Let the States Do It, Not Washington*, Wall Street Journal, March 29, 1999, p. 17, reprinted at http://www.cir-usa.org/articles/mcconnell_brzonkala_editorial.html (a discussion of the United States v. Morrison case after decided by the Fourth Circuit Court of Appeals and before the Supreme Court Decision.

Chief Justice Rehnquist Criticizes Federalization of Crime, National Drug Strategy Network Newsbriefs, (Jan.-Feb. 1999) available at *http://www.ndsn.org/JANFEB99/FEDERAL1.html*

American Bar Association Task Force on Federalization of Criminal Law. The Federalization of Criminal Law (1998).

U. S. Chamber Institute for Legal Refore Litigation Fairness Campaign, *Federalism Interests are Promoted (Not Harmed) by the Proposed Class Action Legislation,* available at http://www.litigationfairness.org/act_federalism.html

National Association of Independent Insurers, *Class Action Lawsuit Reform Backgrounder*, available at http://www.naii.org/sitehome.nsf/ClassActionLawSuitBackgrounder?OpenPage

Cabraser, Elizabeth J. and Nealey, Scott P. *A Solution in Search of a Problem There's No Need to Federalize Class Actions*, reprinted from The Recorder (June 14, 2000) available at http://www.lieffcabraser.com/solution02.htm

WHAT TO WATCH

Multi-Jurisdictional Practice

By Kent Pankey

Just as national and international business developments have challenged traditional legal norms in the area of multidisciplinary practice (see the 1999-2000 *Trends Report*), so they are also challenging legal ethics, bar admission, regulation of lawyers, and the unauthorized practice of law in the area of multi-jurisdictional practice.

The advent of telephonic, and now electronic communications, virtual offices, and portable desktops make 18th-century legal concepts defining jurisdictional practice outdated and outrageous.

Although the law recognizes the ability of a corporation to represent itself legally through a salaried employee, admission to practice requirements, which vary from jurisdiction to jurisdiction nevertheless, do impede the ability of corporate attorneys to represent their clients fully in those jurisdictions.

Clearly, in order to put forward a solution to this issue and succeed, we must decide:

1. What does it mean to practice law in any specific jurisdiction?
    A. What is the practice of law (versus stuff that the unlicensed can do)
    B. What does it mean to practice law in an electronic/virtual age, wherein you can be everywhere at once, and nowhere at any particular moment?
2. What is the legitimate interest of a licensing agency in regulating lawyers who work in today's world of practice, and how can that interest be served and reduced to rules that work?
3. How do we develop the best position that takes the details of these changes into account and actually outlines the necessary steps toward our goal? It's easy to favor cross-border practice, but how will we actually accomplish it?
4. What is the role of the national versus the state bars in resolving this issue? Will it be a competitive / hostile battle, or a challenging, yet cooperative exercise in moving forward together?

http://www.abanet.org/cpr/mjp-home.html

UPDATES

Consortium for State Court Interpreter Program

By Madelynn Herman

The Consortium for State Court Interpreter Certification Program (Consortium) was created in July 1995 to counter the high cost of test development-associated proprietary interests by providing a vehicle for the exchange of expertise while safeguarding work products. The Consortium addresses resource shortages that impede efforts by state courts to define and implement standards for interpreting proficiency. Without those standards, equal access to justice remains an unfulfilled obligation of the United States system of justice.[1]

The Consortium has seen tremendous growth since it's inception in 1995. Twenty-six states are currently members of the National Center's Consortium for State Court Interpreters. **California, Tennessee,** and **Massachusetts** became new members in 2000, **Texas and Kentucky** in 2001. **Nevada** and **Connecticut** are expected to join before the end of 2001. For a listing of member states and the year they jointed the consortium see: http://www.ncsc.dni.us/RESEARCH/INTERP/Members.htm.

The Consortium has also developed 2 new tests in 2000, **Arabic** and **Haitian Creole** and in 2001 a test for **Mandarin** was developed. The Consortium now offers 17 language tests in 11 different languages. An additional accomplishment this year includes the development of a written **English** proficiency test that is now available to consortium states for their interpreter programs. For a listing of consortium language tests that are available to its members, please see: http://www.ncsc.dni.us/RESEARCH/INTERP/Tests.htm.

Consortium Achievements

Achievements of the Consortium since its inception include:

- An increase in state court systems that establish and maintain standards of interpreting proficiency in the courts – from 4 in 1994 to 26 in 2001;
- An increase in the number of interpreters nationwide (approximately 500) whose proficiency is certified as a consequence of valid and reliable interpreting proficiency testing;
- The testing of thousands of individuals since July 1995 in states where testing programs had not previously existed;
- The availability of manuals documenting test construction standards, test administration standards, and test rater qualifications and training standards;
- Increased experimentation and innovation in procedures for test administration that have increased test availability and lowered costs.

[1] "Court Interpretation: The State Court Interpreter Certification Program," *Report on Trends in the State Courts, 1996-1997 Edition*, National Center for State Courts, Information Service, 1997.

Other noteworthy NCSC activities related to court interpreting

In addition to developing tests, making them available to member states, and regulating their use, National Center staff engages in other activities to assist both Consortium members and the court community. These include, seeking funding for and conducting court interpretation research projects; providing on-line information and resources; conducting surveys; the development and maintenance of a listserv for Consortium members; the Federal Court Interpreter Certification program; a test rating training/session; and a distance learning initiative. Summaries of these activities are as follows:

Research Projects. In addition to the Consortium for State Court Interpreters project, other related projects include court interpretation technical assistance, intersystem coordination of court interpreter services in state and federal courts, and state interpreter contracts.

On-line information and resources. The Consortium currently has quite a bit of information on court interpreting on the National Center's web pages. In the near future, consortium staff will be coordinating with NCSC's Information Resource Center to add significant information and resources to the National Center's court interpretation web pages.

Surveys. The Consortium for State Court Interpreters surveyed member states in November of 1999 and 2000. The consortium plans to survey member states again in November of 2001. Summaries of four 1999 survey results are as follows:

- *Certification Requirements Survey*. Among some the most comprehensive certification standards, **Oregon** requires attending a basic orientation workshop, passing a written and oral test, a criminal records check, and swearing an oath. In addition, Oregon also requires 20 hours of court observation within the last 18 months.

- *Test and Educational Fees Survey*. Nine out of twenty-one states surveyed charge a testing fee. Testing fees range from $65 (**New Mexico**) to $225 (**Minnesota**). Ten out of twenty-one states surveyed charge a fee to attend an orientation workshop with fees ranging from $50 (**Minnesota**) to $200 (**Oregon**) per workshop. A number of states do not require any fee for testing or orientation.

- *Compensation for Salaried Interpreters Survey.* **Colorado**, **New Jersey**, and **Oregon** have salaried court interpreters that are state employees. **Florida**, **Illinois** (Cook County), **Michigan**, and **Minnesota** have salaried court interpreters that are county employees.

- *Compensation for Contract Interpreters Survey*. Hourly compensation for contract interpreters' varies greatly. Contract interpreters can be paid hourly, by the day, or half-day. Compensation can also vary by language.

Survey results can be found at: http://www.ncsc.dni.us/RESEARCH/INTERP/index.html

Federal Court Interpreter Certification Program. In January of 2000, the National Center for State Courts was awarded the contract to administer the Federal Court Interpreter Certification Examination (FCICE) program on behalf of the Administrative Office of the United States Courts. CPS Human Resource Services of California and Second Language Testing, Inc. of Bethesda, Maryland is the National Center's collaborating partner sub-contractors on the FCICE program. The sharing of resources and expertise between contributors to these two programs will benefit both the state and federal court interpreter programs.

Test rating/training session. The Consortium coordinated a rater training and test rating session that took place in **Washington** State in June 2001. Teams of test raters in various languages were assembled. These teams scored language tests from five different languages (other than Spanish) that various states had administered and mailed to Washington. On their own, the cost for states to have their language tests evaluated and rated would have been prohibitive.

Distance Learning Initiative. In cooperation with the National Center's Institute for Court Management, development has begun to provide intensive skill building courses in specific languages for court interpreters via web-based distance learning. The first language will be Vietnamese.

Future Direction and Projects for the Consortium

The Consortium representatives and staff of the National Center for State Courts have developed and are introducing standardized written tests to assess the breadth of vocabulary and knowledge of justice system procedures, terminologies, and code of professional conduct. The Consortium's Technical Committee lead by Robert Joe Lee of **New Jersey** is also exploring alternative techniques for qualification assessment in lesser-used languages. The Consortium hopes to continue its efforts to address resource shortages that impede efforts by state courts to define and implement standards for interpreting proficiency.

Recent Publications Relating to Court Interpretation

Leslie Duncan, *Remote Court Interpreting: Development of a Pilot Project in California* (Williamsburg, VA: National Center for State Courts, Institute for Court Management, CEDP Phase III Project, 2001). *

Mary A. Gagne, *Empirical Analysis of Outsourcing Spanish Interpreter Services in Hennepin County District Court* (Williamsburg, VA: National Center for State Courts, Institute for Court Management, CEDP Phase III Project, 2000). *

Improving Interpretation in Wisconsin's Courts: A report on court-related interpreting and translation with recommendations on statute and rule changes, budget items, interpreter training programs and certification tests, and judicial and professional education programs (Madison, WI: Committee to Improve Interpreting and Translation in the Wisconsin Courts, 2000). *

William H. Johnsa, *Interpreters in the Northeastern Judicial Circuit: A Study to Determine the Feasibility of a Court-Annexed Department for Interpretation and Translation*

(Williamsburg, VA: National Center for State Courts, Institute for Court Management, CEDP Phase III Project, 1999). *

Best Practices Manual on Interpreters in the Minnesota State Court System (Minnesota: Supreme Court, Court Interpreter Advisory Committee, 1999). *

Hon. Nancy Campbell, Nori Cross, and Cathy Rhodes, "Chapter 20: Interpreters," *Judges Benchbook* (Salem: OR: Office of the State Court Administrator, February 1999). *

Brenda Avera, *Development of Court Interpreting Program for the Gwinnett Judicial Circuit, Lawrenceville, Georgia* (Williamsburg, VA: National Center for State Courts, Institute for Court Management, Court Executive Development Phase III Paper, 1999). *

State of Hawaii Court Interpreter Needs Assessment: Final Report (Denver, CO: National Center for State Courts, Court Services Division, 1999). *

Robert Joe Lee, *Pilot Test of Telephone Court Interpreting in Atlantic/Cape May-Essex-Hudson: Final Report* (Trenton, NJ: Court Interpreting, Legal Translating, and bilingual Services Section, Special Programs Unit, Office of Trial Support Services, Administrative Office of the Courts, 1998). *

William E. Hewitt, *Managing Language Problems: A Court Interpreting Education Program for Judges, Lawyers, and Court Managers* (Williamsburg, VA: National Center for State Courts, 1997). *

"Overcoming the Language Barrier: Achieving Professionalism in Court Interpreting,"

State Court Journal – Special Issue (Williamsburg, VA: National Center for State Courts, vol. 20, no. 1, 1996). *

William E. Hewitt, *Court Interpretation: Model Guides for Policy and Practice in the State Courts* (Williamsburg, VA: National Center for State Courts, 1995). * You may order this publication on-line at: http://10.10.13.3/PUBS/PUB_CAT.HTML or by calling 888-228-NCSC.

The following videos can be obtained by contacting Bristol Productions LTD, 2401 Bristol Court SW, Olympia, WA 98502, 360-754-4260, or fax 360-754-4240.

Mental Commitment Hearing Interpreting
Working with Interpreters
*Interpreters: Their Impact on Legal Proceedings**

*These publications can be borrowed from the NCSC library by calling 800-616-6164.

<u>On-Line Court Interpretation Articles/Resources</u>

Sean Gillespie, "Increased Diversity Fuels Need for Court Interpreters - Spending on Interpreting Services Grew by more than 9 percent since 1998," *South County Journal*, Washington, June 19, 2001; http://www.southcountyjournal.com/sited/story/html/57480

Isabele Framer, "Suggested Guide for Interpreter Proceedings," *The Advocate*, vol. 23, no. 3, May 200l; http://dpa.state.ky.us/library/advocate/may01/advframe.html

Donna Carr, “Lost in the Translation: Due Process for Non-English Speaking Defendants from an Appellate Perspective,” *The Advocate*, vol. 23, no. 3, May 200l; http://dpa.state.ky.us/library/advocate/may01/advframe.html

Christine Mahr, “The Need for Court Interpreters Rises with Growing Diversity—Statewide Shortage Delays Processing of Criminal Cases,” *thedesertsun.com*, July 4, 2000; http://www.thedesertsun.com/news/stories/local/962686963.shtml

Isabele Framer, “Interpreters and their Impact on the Criminal Justice System: The Alejandro Ramirez Case,” *Proteus*, vol. 9, nos. 1&2, Winter-Spring 2000; http://www.najit.org/proteus/back_issues/phoneinterp.html

Virginia Benmaman, “Interpreter Issues on Appeal,” *Proteus*, vol. 9, no. 4, Fall 2000; http://www.najit.org/proteus/v9n4/benmaman_v9n4.html

Holly Michaelson, “Towards a Redefinition of the Role of the Court Interpreter,” *ACEBO*; http://www.acebo.com/papers/rolintrp.htm

Mirta Vidal, “Telephone Interpreting: Technological Advance or Due Process Impediment?” *Proteus*, vol. 7, no. 3, summer 1999; http://www.najit.org/proteus/back_issues/vidal3.html

Mirta Vidal, “New Study on Fatigue Confirms Need for Working in Teams,” *Proteus*, vol. 7, no. 1, winter 1997; http://www.najit.org/proteus/back_issues/vidal2.html

Madelynn Herman and Anne Endress Skove, “State Court Rules for Language Interpreters,” *Information Service Memorandum No. IS99.1242*, National Center for State Courts, Sept. 8, 1999; http://www.ncsc.dni.us/is/MEMOS/S99-1242.htm.

On-line Court Interpretation Information and Resources, at the National Center for State Courts’ web pages provides helpful resources and information at: http://www.ncsc.dni.us/RESEARCH/INTERP/index.html.